No. 77-509

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

FRANK C'NEAL ADDINGTON, Appellant

v.

THE STATE OF TEXAS

Appeal from the Supreme Court of Texas

JURISDICTIONAL STATEMENT

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

FRANK O'NEAL ADDINGTON, Appellant

v.

THE STATE OF TEXAS

Appellant Frank O'Neal Addington appeals from the judgment of the Supreme Court of Texas, which affirmed a trial court judgment sustaining, against challenge under the Constitution of The United States, the indefinite commitment of Appellant to a mental hospital by a standard proof less than beyond a reasonable doubt.

THE OPINIONS BELOW

The opinion of the Supreme Court of Texas is not yet reported. It is set forth in Appendix A to this Statement (pp. A-1-2, infra). The prior opinion of the Civil Court of Appeals of the Ninth Supreme Judicial District of Texas is reported at 546 S.W. 2d 105, and is set forth in Appendix A, pp. A-4-5, infra. The Trial Court rendered no opinion.

Appellant has set forth in Appendix B the opinions of the Supreme Court of Texas (pp. B-1-7, infra) and the Court of Civil Appeals for the Third Supreme Judicial District of Texas (pp. B-8-12, infra) in the case of The State of Texas v. Turner. That case raises the identical issue presented by this case, and the opinions below in this case were based upon opinions below in the Turner case. Turner is reported at 543 S.W. 2d 453 and 556 S.W. 2d 563.

JURISDICTION

This is an indefinite civil commitment proceeding instituted by the Appellee in the Probate Court of Galveston County, Texas, under the provisions of the Texas Mental Health Code, TEX. REV.

CIV. STAT. ANN. Art. 5547-40 et seq. (1958) (Appendix C, pp. C-1-8, infra) under which Appellant was indefinitely committed to a state mental hospital. The trial court construed the statute to require proof only by "clear, unequivocal and convincing evidence," and so instructed the jury. Appellant contended that the statute, if construed to require a standard of proof less than proof beyond a reasonable doubt, is invalid because it is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Appellant appealed his commitment to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, where he secured a ruling that the proper standard of proof under the statute and under the Fourteenth Amendment was proof beyond a reasonable doubt, that Court reversing the judgment of the trial court.

Appellee, the State of Texas, appealed the judgment of the Court of Civil Appeals to the Supreme Court of Texas. That Court, the highest in the state, construed the statute to require proof only by a preponderance of the evidence and upheld the validity of the statute as so construed, in the face of a challenge to its constitutionality as so construed. The Court applied and enforced the statute to the disadvantage of Appellant by way of affirming the trial court's order of commitment, thus depriving Appellant of his liberty.

The judgment sought to be reviewed is that of the Supreme Court of Texas entered October 12, 1977, reversing the judgment of the Court of Civil Appeals and affirming the judgment of the trial court. No motion for rehearing was filed. Southern Ry. Co. v. Clift, Ind., 43 S.Ct. 126, 260 U.S. 316, 67 L.Ed. 283 (1922). Notice of Appeal was filed in the Supreme Court of Texas on December 30, 1977.

Jurisdiction of the Supreme Court to review the decision of the Texas Supreme Court is conferred by 28 U.S.C. § 1257(2). Jurisdiction is sustained by the following cases:

Application of Gault, 87 S.Ct. 1428, 387 U.S. 1, 18 L.Ed. 2d 527 (1967).

The American Oil Company v. P.G. Neill, 85 S.Ct. 1130, 380 U.S. 451, 14 L.Ed. 2d, 1 (1965).

Jenkins v. Georgia, 94 S.Ct. 2750, 418 U.S. 153, 41 L.Ed. 2d 642 (1974).

Cox Broadcasting Corp. v. Cohn, 95 S.Ct. 1029, 420 U.S. 469, 43 L.Ed. 2d 328 (1975).

Dahnke-Walker Milling Co. v. Bondurant, 42 S.Ct. 106, 257 U.S. 282, 66 L.Ed. 239 (1922).

STATUTE INVOLVED

Pertinent portions of the Texas Mental Health Code, TEX. REV. CIV. STAT. ANN. Art. 5547 (1958) are set forth in Appendix C, pp. C-1-8, infra.

QUESTION PRESENTED

Where a state statute providing for the indefinite commitment of individuals to a mental hospital has been construed by the highest court of the state to require proof of the state's case for commitment by a standard proof of less than beyond a reasonable doubt, is such statute, on its face or as applied, repugnant to the due process requirements of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Appellant was alleged by Appellee, the State of Texas, to be mentally ill and in need of hospitalization. Appellee brought proceedings under the Texas Mental Health Code (Appendix C, pp. C-1-8, infra) to have Appellant committed to a state mental hospital indefinitely. Trial was had before a jury which was instructed, over the objection of Appellant, to make its findings by "clear, unequivical and convincing evidence." The jury found Appellant to be mentally ill and in need of hospitalization, and the Court entered its order committing him to Austin State Hospital for an indefinite period of time.

Appellant appealed to the Texas Court of Civil Appeals on constitutional grounds, arguing that due process requires that in cases brought under the indefinite commitment provisions of the Texas Mental Health Code, the burden be on the State to prove its case for indefinite commitment beyond a reasonable doubt. Appellant urged that the statute be construed to require proof beyond a reasonable doubt; but also argued that if the trial court had been correct in construing the statute to require less than that quantum of proof, the statute is unconstitutional. The Court of Civil Appeals held that the statute did require proof beyond a reasonable doubt, and it reversed and remanded the case to the trial court.

Appellee then filed its application for writ of error in the Supreme Court of Texas. While the Application was pending, the Texas Supreme Court decided the identical issue in The State of Texas v. Turner (Appendix B, pp. B-1-7, infra), holding that the statute requires only proof by a preponderance of evidence, and that such a standard passes Constitutional muster. The Court then simultaneously granted Appellee's application and issued its order reversing the Court of Civil Appeals and affirming the Trial Court's judgment of commitment.

HOW THE FEDERAL QUESTION WAS RAISED

Appellant first raised the question of the proper standard of proof for an indefinite civil commitment, and the Constitutionality thereof, in his Request for Jury Instructions (Appendix D, pp. D-1-3, infra), in which he requested the Court to instruct the jury that the burden was on the state to prove its case for the indefinite commitment of Appellant beyond a reasonable doubt.

The Trial Court denied Appellant's request and instructed the jury that the standard of proof was "clear, unequivical and convincing evidence." (Appendix D, pp. D-4-6, infra). Appellant filed his Objections to the Charge (Appendix D, pp. D-7-9, infra), again urging the reasonable doubt standard.

The jury found Appellant to be mentally ill and the Trial Court entered its judgment of commitment (Appendix A, pp. A-7-8, infra). Under Texas law, Appellant was not required to file a motion for a new trial, but rather was authorized to appeal immediately and directly to the Court of Civil Appeals.

In the Court of Civil Appeals, Appellant raised the federal question by Points of Error in his brief and oral argument, that being the sole method of doing so under Texas law. The pertinent portions of the brief of Appellant are appended to this statement in Appendix D, pp. D-10-18, infra. The Points of Error contained therein which are in issue in this Court are set forth as follows:

"ONE

"Due Process of law is required in a civil commitment proceeding; and the Trial Court's interpretation of section 52(b) of the Texas Mental Health Code denied Appellant due process of law by refusing him those minimum findings that due process requires for a deprivation of liberty.

" . . .

"SUBPOINT C

"The Court failed to instruct the jury that the burden of proof was on Appellee to prove beyond a reasonable doubt that Appellant requires hospitalization in a mental hospital for his own welfare and protection or the protection of others.

"TWO

"If the court's construction of section 52(b) is correct, then section 52(b) is unconstitutional, and the court erred in rendering judgment thereunder."

The Court of Civil Appeals reversed and remanded the case, agreeing with Appellant that the proper standard of proof under the statute was "beyond a reasonable doubt," and thereby upholding the validity of the statute on its face, but not as applied. (Appendix B, pp. A-4-6, infra).

The federal question was raised in the Supreme Court of Texas by Appellee's filing of its Application for Writ of Error, the body of which is set forth in Appendix D, pp. D-19-24, infra. Although under Texas law the non-appealing party is not required to file a reply to an application for writ of error, Appellant did so

(Appendix D, pp. D-25-28, infra). The Court of Civil Appeals had construed the statute so as to make it valid under the Constitution. Appellee urged in his application to the Texas Supreme Court that such a construction was not required by due process. Appellant contended in his reply that the Court of Civil Appeals had correctly construed the statute in view of due process requirements.

While Appellee's Application for Writ of Error was still pending in the Texas Supreme Court, that Court decided in the Turner case, supra, that the proper standard of proof under the Texas Mental Health Code's indefinite commitment provisions was that of a preponderance of the evidence (Appendix B, pp. B-1-7, infra). Accordingly, the Court granted Appellee's application, and without briefs or oral argument, simultaneously reversed the Court of Civil Appeals and affirmed the Trial Court's judgment. The Court thereby construed the state statute in such a manner as to render it unconstitutional on its face, but upheld its validity as so construed in the face of a constitutional challenge. It then applied and enforced the statute, to the disadvantage of appellant. Cf. Dahnke-Walker Milling Co., v. Bondurant, 42 S.Ct. 106, 108; 257, U.S. 282, 290; 66 L.Ed. 239 (1922).

THE QUESTION IS SUBSTANTIAL

The question of the constitutionally required standard of proof for an indefinite civil commitment has never been decided by this Court. It is a question of the struggle between the power of the state and the freedom of the individual, and, as such, is a question of great public importance. The recent upsurge in litigation and legislative enactment on the subject of the rights of the individual faced with civil commitment bears witness to widespread concern with this question, and to the need for an authoritative statement from the highest court of the land.

The question of standard of proof is not a question of whether due process is required in a civil commitment, but rather

a question of the nature and extent of the impact of due process on civil commitment proceedings. The debate in legislative chambers and courts of law across the nation has been on the one hand that the loss of freedom occasioned by a civil commitment manifests such a deprivation of liberty that the due process safeguards traditionally reserved for criminal proceedings must apply; and, on the other hand that the civil nature of the proceedings together with the beneficent state purpose renders unnecessary such stringent constitutional safeguards.

This Court has never passed upon the applicability of the requirements of Gault and Winship to civil commitment proceedings. The Texas Supreme Court, in determining whether reasonable doubt was required for indefinite civil commitments, found several distinctions between criminal proceedings and civil commitment proceedings which it used to justify the use of a lesser standard: 1) that the patient has the right to treatment, to periodic review of his mental condition, and to release when he is no longer dangerous; 2) that the determination of future conduct and needs significantly differs from the retroactive assessment of conduct, the inexactitude of the psychiatric science rendering the former more difficult; and 3) that the ability of the state to act in

parens patriae for the mentally ill would be so impaired by the use of the reasonable doubt standard that the use of a lesser standard would be justified (Appendix A, pp. A-1-2, Appendix B, pp. B-6-7, infra). Accordingly, the Texas Supreme Court ruled that it would require for indefinite civil commitments only proof by a preponderance of the evidence, the lowest standard of proof known in our jurisprudence.

1. Appellant answers that this Court has yet to rule on the requirement of dangerousness as a standard for either commitment or release from commitment, nor has it ruled on the right to treatment of persons who are deemed dangerous. The Texas Supreme Court has never directly ruled on these issues either, and only the right to periodic review is found in the Texas statutes. Consequently, these distinctions, though relied on by the Texas Supreme Court, cannot justify the requirement of less proof than beyond a reasonable doubt in indefinite civil commitment proceedings.

2. Appellant agrees that future and retroactive determinations differ significantly. Appellant urges, however, that the vagaries inherent in predicting the future render it all the more necessary that a high standard of proof be exacted before incarcerating a person on the basis of a prediction on his future behavior. In agreement with this reasoning, the Court of Civil Appeals in Turner, supra, wrote: "It occurs to us that because psychology and psychiatry are not exact sciences, greater care should be exercised in indefinite commitments, and accordingly, a stricter burden of proof should be required of the State." (Appendix B, p. B-11, infra).

3. In Winship, supra, this Court expressly rejected "beneficent state purposes" as a rationale for requiring less than proof beyond a reasonable doubt in juvenile delinquency proceedings. "Civil labels and good intentions do not themselves obviate the need for criminal due process safeguards." Winship, supra, at 365-6, citing Gault, supra, at 36.

The Texas Supreme Court did not attempt to justify, in light of Winship and Gault its use of the beneficent-state-purpose rationale for civil commitments. It seems clear, however, that this rationale is no more justifiable a basis for less than criminal due process safeguards in civil commitments than it is in juvenile proceedings or in criminal proceedings.

> It matters not whether the proceedings be labelled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration--whether for punishment as an adult for a criminal, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent--which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process...

Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).

Furthermore, this Court in Winship found that use of the reasonable doubt standard would not thwart the beneficent state purposes manifested in juvenile delinquency proceedings. Id., 367. Likewise, Appellant argues that neither will the beneficent state purposes of civil commitment be thwarted by use of the reasonable doubt standard. The important concern is that those purposes--commitment for the benefit of the patient and of society--not be brought to bear against a person not actually in need of commitment. That concern may be served only by use of the reasonable doubt standard.

Accordingly, large numbers of courts across the nation have ruled that due process requires the standard of proof beyond a reasonable doubt for civil commitments. Among them are In re Ballay, 482 F.2d 648 (D.C. Cir. 1973); Suzuki v. Quisenberry, 411 F. Supp. 113 (D.C. Hawaii 1976); Lessard v. Schmidt, 346 F. Supp. 1078 (E.D. Wisc. 1972), vacated and remanded, 414 U.S. 473 (1974), on remand 379 F. Supp. 1376 (1974), vacated and remanded 421 U.S. 957 (1975); Denton v. Commonwealth, 365 S.W. 2d 681 (Ky. 1964); Ex Parte Perry, 43A. 2d 885 (N.J. 1945); Matter of Alexander, 554 P. 2d 524 (Ore. Ct. App. 1976).

The reasoning is clear in these cases that because a person being committed may be forever deprived of his personal liberty, because social and economic stigmas attach to one who has been involuntarily committed as a mental patient, and because the needs to be served by commitment are necessarily speculative, due process requires an extremely cautious approach to the determination that commitment is justified. There is no rational basis for a rule that would require less caution in an indefinite civil commitment than in a criminal or juvenile proceeding.

The possibility of unnecessary and unjustified deprivation of personal liberty is the crux of the question brought forward in this appeal. The value traditionally placed on individual freedom in our society renders the question one of substantial and urgent importance.

CONCLUSION

For the reasons stated, Appellant respectfully submits that the question presented in this appeal is so substantial as to require plenary consideration, with brief on the merits and oral argument, for its resolution.

Respectfully submitted,

William P. Allison
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(512) 478-7463
Counsel for Appellant

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5992

FRANK O'NEAL ADDINGTON,

Appellant

—*v.*—

THE STATE OF TEXAS

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF TEXAS

DOCKETED JANUARY 6, 1978
PROBABLE JURISDICTION NOTED APRIL 17, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5992

FRANK O'NEAL ADDINGTON,

Appellant

—*v.*—

THE STATE OF TEXAS

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF TEXAS

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CHRONOLOGICAL LIST OF SIGNIFICANT DATES

(in Lieu of Docket Entries)

January 7, 1976 Petitioner The State of Texas' Petition for Indefinite Commitment of Frank O'Neal Addington filed in Probate Court of Galveston County, Texas

February 2, 1976 Commencement of Jury Trial

February 6, 1976 Respondent's Request for Jury Instructions filed; Order of Court denying same made and entered

February 6, 1976 Respondent's Objection to Charge filed; Order of Court Denying same made and entered.

February 6, 1976 Charge of the Court, together with the Verdict and Certificate of the Jury, filed

February 6, 1976 Judgment of Court for Indefinite Commitment made and entered

April 22, 1976 Cause docketed in Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas

October 18, 1976 Appellant Frank O'Neal Addington's Brief filed in Court of Civil Appeals

November 12, 1976 Appellee The State of Texas' Brief filed in Court of Civil Appeals

November 29, 1976 Oral Argument had in Court of Civil Appeals

January 6, 1977 Opinion and Judgment of Court of Civil Appeals rendered, reversing and remanding judgment of trial court

March 2, 1977 Petitioner The State of Texas' Application for Writ of Error filed in Supreme Court of the State of Texas

March 16, 1977 Respondent's Reply to Application for Writ of Error filed in Supreme Court of the State of Texas

October 12, 1977 Opinion and Judgment of the Supreme Court of the State of Texas rendered, reversing judgment of Court of Civil Appeals and affirming judgment of trial court.

December 30, 1977 Petitioner Frank O'Neal Addington's Notice of Appeal to United States Supreme Court filed in Texas Supreme Court

IN THE PROBATE COURT OF
GALVESTON COUNTY, TEXAS

THE STATE OF TEXAS FOR THE BEST INTEREST
AND PROTECTION OF

FRANK O'NEAL ADDINGTON

AS A MENTALLY ILL PERSON

PETITION FOR INDEFINITE COMMITMENT—
Filed January 7, 1976

Now comes Jerome Jones, an adult person, a resident of Galveston County, Texas, hereinafter called Petitioner, and respectfully presents this petition for indefinite commitment to a mental hospital for the hereinafter named Patient, and respectfully shows the Court upon information and belief the following:

1. That Frank O'Neal Addington, hereinafter called Patient, is hospitalized, resides in or is found in this County.
2. That by order of the Probate Court of Galveston County, Texas, in Cause No. 32,948, Patient has been under observation and/or treatment in the Austin State Hospital for at least sixty days and that said order for temporary commitment was entered within twelve months immediately preceding the filing of this petition.
3. That the address of the Patient is 209 Old Bayou Dr., Dickinson, Tx.
4. That the name and address of Patient's spouse, parents, children, brothers, sisters and legal guardian are as follows:

Father J. D. Addington 209 Old Bayou Dr,. Dickinson, Tx.

5. That Petitioner's address is Galveston County Courthouse, Galveston, Tx.
6. That Petitioner's relationship to Patient is Judge.
7. That a statement of Petitioner's interest in this proceeding is Judge.
9. That Patient is not charged with a crime.

10. That Patient is mentally ill and requires hospitalization in a mental hospital for his own welfare and protection or the protection of others.

11. That attached to and accompanying this petition is a certificate of medical examination by a physician who has examined Patient within the fifteen days immediately preceding the filing of this petition, stating in the opinion of the examining physician that Patient is mentally ill and requires hospitalization in a mental hospital.

THEREFORE, Petitioner prays this Honorable Court to set a date and place for a hearing on this petition; that a copy of this petition and notice of hearing be peronally served on Patient; that a copy of this notice and petition be sent by registered mail to the guardian or responsible relative of Patient; that an attorney ad litem be appointed to represent Patient; that it be determined whether or not Patient is mentally ill and if so whether Patient requires hospitalization in a mental hospital for his own welfare and protection, and for such other orders as may be necessary and to the best interest of Patient.

DATED this the 7th day of January 1976.

/s/ Jerome Jones
Petitioner

[Jurat Omitted in Printing]

IN THE PROBATE COURT
GALVESTON COUNTY, TEXAS

No. 32,948

IN RE: FRANK O'NEAL ADDINGTON

REQUEST FOR JURY INSTRUCTIONS—
Filed February 6, 1976

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES FRANK O'NEAL ADDINGTON, by and through his attorney of record Martha L. Boston, and moves the Court that, at the close of the evidence and before the jury retires to consider the evidence, the jury be given the following instructions concerning the law which they are to apply in deciding the above entitled and numbered cause:

Frank O'Neal Addington is alleged by Petition for Indefinite Commitment to be mentally ill to the extent that he requires hospitalization in a mental hospital for his own welfare and protection or the protection of others.

1. To find that Frank O'Neal Addington should be committed to a mental hospital, you must find two things:

   A. That he is mentally ill, and

   B. That he requires hospitalization in a mental hospital for his own welfare and protection or the protection of others. A finding that Frank O'Neal Addington is mentally ill will not, by itself, justify his commitment.

2. A mentally ill person is one whose mental health is substantially impaired.

3. In order to find that Frank O'Neal Addington "requires" hospitalization in a mental hospital, you must find that commitment to a mental hospital is the only available means by which his own welfare and protection or the protection of others may be achieved.

4. In order to find that Frank O'Neal Addington requires hospitalization in a mental hospital, you must find that he lacks the capacity to make a reasoned choice about whether or not to be hospitalized. If you find that Frank O'Neal Addington is capable of reasonably choosing whether or not to be hospitalized, you must find that he does not require hospitalization.

5. In order to find that Frank O'Neal Addington requires hospitalization in a mental hospital, you must find that the hospitalization he is to receive will be beneficial to his mental health.

6. In order to find that Frank O'Neal Addington requires commitment "for his own welfare and protection," you must find that hospitalization is necessary to protect him from immediate and serious bodily harm. To find harm of this character you must find either

A. that Frank O'Neal Addington will suffer self-inflicted injury which will result in loss of his life or in serious bodily injury, or

B. that Frank O'Neal Addington is unable to provide for his basic personal needs of survival such as food, clothing and shelter. A finding that hospitalization would be for Frank O'Neal Addington's welfare is insufficient unless you also find that hospitalization is required for his protection.

7. In order to find that Frank O'Neal Addington requires commitment for "the protection of others," you must find that unless he is hospitalized, he will cause immediate serious bodily injury to someone other than himself.

8. To justify commitment, it is necessary that you find that hospitalization is required either "for his own welfare and protection (as defined in #6 above) or "for the protection of others" (as defined in #7 above).

9. In cases where a person may be deprived of his liberty, the burden of proof is upon the State. Frank O'Neal Addington is presumed not to require hospitalization until his mental illness and the need to protect him or others are established beyond a reasonable doubt; and in this case, if you have a reasonable doubt as to Frank O'Neal Addington's requiring hospitalization for his welfare and protection or for the protection of others, you will find that he does not require hospitalization.

10. You are instructed not to allude to, comment on, discuss or consider the failure of Frank O'Neal Addington to testify in this case, nor will you refer to or discuss any matter not before you in evidence. No juror may lawfully relate to the others any fact or circumstance of which he may have or claim knowledge or information and not introduced in evidence.

11. The Petition for Indefinite Commitment is the pleading upon which Frank O'Neal Addington is sought to be committed. It cannot be considered as a fact or circumstance against him, and you will not discuss it as such.

12. You are the exclusive judges of the facts proved and of the credibility of the witnesses, and of the weight to be given their testimony, but you are bound to receive the law from the Court, which is herein given to you, and be governed thereby.

Respectfully submitted,

/s/ _____

Martha L. Boston
BOSTON & BROWN
1305 San Antonio
Austin, Texas 78701
Attorney for
Frank O'Neal Addington

February 6, 1976
Request for Jury Instruction denied.
Jerome Jones, Judge

IN THE PROBATE COURT OF
GALVESTON COUNTY, TEXAS

No. 32,948

IN RE: FRANK O'NEAL ADDINGTON

RESPONDENT'S OBJECTION TO CHARGE—
Filed February 6, 1976

Respondent objects to the omission of the following instructions in the court's charge to the jury:

I.

A. In order to find that Frank O'Neal Addington requires hospitalization in a mental hospital for any reason, you must find that commitment to a mental hospital is the only available means by which his own welfare and protection or the protection of others may be achieved.

B. In order to find that Frank O'Neal Addington requires hospitalization in a mental hospital, you must find that he lacks the capacity to make a reasoned choice about whether or not to be hospitalized. If you find that Frank O'Neal Addington is capable of reasonably choosing whether or not to be hospitalized, you must find that he does not require hospitalization.

C. In order to find that Frank O'Neal Addington requires hospitalization in a mental hospital, you must find that the hospitalization he is to receive will be beneficial to his mental health.

D. In order to find that Frank O'Neal Addington requires hospitalization "for his own welfare and protection" you must find that hospitalization is necessary to protect him from immediate and serious bodily harm. To find harm of this character you must find both

1. That Frank O'Neal Addington is unable to provide for his basic personal needs of survival such as food, clothing and shelter, and

2. That Frank O'Neal Addington will suffer self-inflicted injury which will result in loss of his life or in serious bodily injury. A finding that hospitalization would be for Frank O'Neal Addington's welfare is insufficient unless you also find that hospitalization is required for his protection.

E. In order to find that Frank O'Neal Addington requires commitment for "the protection of others" you must find that unless he is hospitalized, he will cause immediate serious bodily injury to someone other than himself.

F. In cases where a person may be deprived of his liberty, the burden of proof is upon the state. Frank O'Neal Addington is presumed not to require hospitalization for any reason until his mental illness and the need to protect him or others are established by the state.

G. The standard of proof in this case is beyond a reasonable doubt. If you have a reasonable doubt as to Frank O'Neal Addington's requiring hospitalization for his welfare and protection or for the protection of others, you will find that he does not require hospitalization.

H. You are instructed not to allude to, comment on, discuss or consider the failure of Frank O'Neal Addington to testify in this case.

I. The petition for indefinite commitment is the pleading upon which Frank O'Neal Addington is sought to be committed. It cannot be considered as a fact or circumstance against him, and you will not discuss it as such.

J. You are the exclusive judges of the facts proved and of the credibility of the witnesses, and of the weight to be given their testimony, but you are bound to receive the law from the court, which is herein given to you, and be governed thereby.

II.

Respondent objects to the omission of the following special issues:

A. Do you find that at least two (2) physicians who have examined Frank O'Neal Addington within the fif-

teen (15) days immediately preceding this hearing testified at this hearing?

B. Do you find that Frank O'Neal Addington has been under observation and/or treatment in the Austin State Hospital for at least sixty (60) days pursuant to an order of temporary hospitalization entered within the twelve (12) months immediately preceding the filing of the petition for indefinite commitment?

1. If you find that the state has not presented evidence that by order of temporary hospitalization, Frank O'Neal Addington was committed to Austin State Hospital, you will find that he has not been so hospitalized.

2. If you find that the state has not presented evidence that the order of temporary hospitalization was a valid order, you will find that Frank O'Neal Addington has not been so hospitalized.

Respectfully submitted,

/s/ _____

Martha L. Boston
1305 San Antonio
Austin, Texas 78701

Attorney for
Frank O'Neal Addington

February 6, 1976

The Respondent's objections herein submitted are denied.

Jerome Jones, Judge

IN THE PROBATE COURT OF
GALVESTON COUNTY, TEXAS

No. 32,948

THE STATE OF TEXAS FOR THE BEST INTERST AND PROTECTION OF FRANK O'NEAL ADDINGTON

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you on special issues which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom together with the law as given you by the court. In your deliberations you will not consider or discuss anything that is not represented by the evidence in this case.

3. You must not decide who you think should win, and then try to answer the question accordingly. Simply answer the question, and do not discuss nor concern yourselves with the effect of your answer.

4. You will not decide the issue by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average.

5. Your answer must be unanimous or by the vote of 5 members of the jury. You will not, therefore, enter into an agreement to be bound by a majority of any vote other than a unanimous vote of all jurors or by the vote of 5 members of the jury. If less than the original 6 render a verdict, the verdict must be signed by each juror concurring therein.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and judge. If it should be found that you have disregarded any of these instructions it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The foreman or any other juror who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

This case is presented under the provisions of the Texas Mental Health Code to determine whether Frank O'Neal Addington is mentally ill and requires hospitalization in a mental hospital for his own protection or the protection of others.

The following two issues are submitted to you for your deliberation and answer in the above case:

1. Based on clear, unequivocal and convincing evi-ing evidence, is Frank O'Neal Addington mentally ill?

2. Based on clear, unequivocal and convincing evidence, does Frank O'Neal Addington require hospitalization in a mental hospital for his own welfare and protection or the protection of others?

As used in the above issue, mentally ill means a mental condition which is such as to substantially impair the person's mental health.

/s/ _____
Jerome Jones
Judge

VERDICT

We, the Jury, find in response to the above issues submitted to us as follows:

1. In response to the first issue, we find Frank O'Neal Addington is mentally ill.

2. In response to the second issue, we find that Frank O'Neal Addington does require hospitalization in a mental hosiptal for his own welfare and protection or the protection of others.

/s/ _____
Carl E. Schrerer
Foreman

After you retire to the jury room, you will select your own foreman. The first thing the foreman will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

/s/ _____
Jerome Jones
Judge presiding

CERTIFICATE

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

(To be signed by the foreman if unanimous)

_____

Foreman

(To be signed by those rendering the verdict if not unanimous)

/s/ _____ /s/ _____

Carl E. Schrerer, Jr. Mary F. Golden

/s/ _____ /s/ _____

Lois O. Thonson Blanche L. Flynn

/s/ _____

Mabel L. Landers

IN THE PROBATE COURT OF
GALVESTON COUNTY, TEXAS

No. 32,948

THE STATE OF TEXAS FOR THE BEST INTEREST AND PROTECTION OF FRANK O'NEAL ADDINGTON AS A MENTALLY ILL PERSON

JUDGMENT—Filed February 6, 1976

On this the 6th day of February, 1976, came on to be heard the petition of Jerome Jones, filed with the Clerk of this Court on the 7th day of January, 1976, alleging that Frank O'Neal Addington hereinafter termed Patient, is mentally ill and requires hospitalization in a mental hospital for Patient's own welfare and the protection of others.

It appearing to the Court that all necessary parties have been served with a copy of said petition and written notice of the time and place of the hearing and Martha Boston, Attorney for Patient, announced ready and appeared for and in behalf of Patient and no waiver of jury having been filed in this cause, and a jury of six good and lawful men of Galveston County, Texas, were duly impaneled and sworn according to law, who after hearing the petition, the evidence, including the testimony of B. W. Henry and J. R. Markette, both physicians licensed to practice medicine in the State of Texas, or employed by a state mental hospital or by an agency of the United States, and each having a license to practice medicine in any state of the United States, and having examined patient within fifteen days immediately preceding this hearing, and after receiving the charge of the Judge, the following special issues were submitted to the jury, to-wit:

1) Based on clear, unequivocal and convincing evidence, is Frank O'Neal Addington mentally ill?

2) Based on clear, unequivocal and convincing evidence, does Frank O'Neal Addington require hos-

pitalization in a mental hospital for his own welfare and protection or the protection of others?

WHEREUPON the jury, after due deliberation had, came and returned unto the Court the following verdict and answers to the special issues submitted, to-wit:

We, the jury, in response to the special issues submitted to us by the Court, find the following special verdict, to-wit:

1) In response to the first issue, we find that Frank O'Neal Addington is mentally ill.

2) In response to the second issue, we find that Frank O'Neal Addington does require hospitalization in a mental hospital for his own welfare and protection or the protection of others.

/s/ _____
Carl E. Schrerer
Foreman

It is, therefore, adjudged, ordered and decreed that Patient is mentally ill, requires hospitalization in a mental hospital for his own welfare and protection or the protection of others and is mentally incompetent and is hereby committed for an indefinite period as a patient to Austin State Hospital.

It is further ordered that the Clerk of this Court issue a writ of commitment in duplicate to the Sheriff of this county authorizing and commanding said Sheriff to take charge of Patient and to transport to the above designated mental hospital.

The head of the above named hospital, upon receiving a copy of the writ of commitment and admitting Patient, shall give the person transporting Patient a written statement acknowledging acceptance of Patient and of any personal property belonging to Patient and shall file a copy with the Clerk of this Court.

It is further ordered that the applicant in this cause, attorney for Patient, examining physicians, and the clerk of this court, cause to be prepared a property and financial statement and a case history pertaining to patient, and that a copy of said statement be included in the transcript of these proceedings to be sent to the Board for Texas State Hospitals and Special Schools, and a copy to be included in a transcript of these proceedings to be sent to the head of the hospital to which patient is committed.

The Clerk of this Court is further ordered to prepare two certified transcripts of the proceedings in this cause and to send one to the Board for Texas State Hospitals and Special Schools and one to the head of the hospital to which Patient is committed.

/s/ _____
Jerome Jones
Judge
Galveston County, Texas

IN THE COURT OF CIVIL APPEALS OF TEXAS

No. 7910

FRANK O'NEAL ADDINGTON, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

OPINION—January 6, 1977

This is an appeal from an indefinite commitment of the appellant to the Austin State Hospital under the provisions of *Sec. 52(b)* of the *Texas Mental Health Code, TEX. REV. CIV. STAT. ANN. Art. 5547 (1958).*

The fact structure of the case which we review is almost a mirror image of the facts recited by Justice Shannon in the opinion in Turner v. State, *543* S.W. 2d *543* (Tex. Civ. App.—Austin, application pending), not yet reported except in 2 T.C.R. 92. For this reason, we omit any factual resume underlying the single question which we will confront in this opinion.

Appellant has vigorously urged, in the brief and in oral argument, that the trial court erred in overruling his objection to the charge because it did not require the State to prove the factual basis for the confinement beyond a reasonable doubt. Just as in *Turner*, supra, the Court submitted such issues requiring the State to establish its right to affirmative answers thereto only by "clear and convincing" evidence.

We are in complete agreement with the rationale and the result reached in *Turner*, and do not find it necessary to write further on the question. In making this determination, we fully realize that the Tenth Court of Civil Appeals has held to the contrary. See Powers v. State, *543* S.W. 2d *194* (Tex. Civ. App.—Waco 1976, application pending), not yet reported except in 2 T.C.R. 31.

There are other points brought forward; but, until we have an authoritative answer to the question of the

quantum of proof required, we do not deem it either advisable or necessary to pass upon them.

The judgment of the trial court is reversed and the cause is remanded.

REVERSED and REMANDED.

Quentin Keith
Justice

Opinion delivered January 6, 1977

Justice Stephenson not participating.

IN THE COURT OF CIVIL APPEALS OF TEXAS

No. 7910

FRANK O'NEAL ADDINGTON

vs.

THE STATE OF TEXAS

JUDGMENT RENDERED—January 6th, 1977

This case came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was error in the judgment of the court below, it is, therefore, considered, adjudged and ordered that the judgment of the court below be reversed and remanded. A certified copy of the judgment shall be certified below for observance.

A true copy of the judgment to be entered, I hereby certify.

Joe A. Hulgan, Clerk

IN THE SUPREME COURT OF TEXAS
FROM GALVESTON COUNTY
NINTH CIRCUIT

No. B-6597

STATE OF TEXAS, PETITIONER

v.

FRANK O'NEAL ADDINGTON, RESPONDENT

PER CURIAM—October 12, 1977

This case involves the proper standard of proof that is required in indefinite commitment cases under the provisions of the Texas Mental Health Code.[1] Frank Addington was committed to the Austin State Hospital for an indefinite period of time after the jury found that he was mentally ill and required hospitalization for his own welfare and protection, as well as for the protection of others. The trial judge instructed the jury that the State's burden was to prove each special issue by "clear and convincing evidence." The court of civil appeals reversed and held that the proper standard of proof was "beyond a reasonable doubt." 546 S.W. 2d 105.

The holding in the instant case conflicts with this court's decision in State v. Turner, —— S.W. 2d ——, 20 Tex. Sup. Ct. J. 510 (Sept. 27, 1977). The facts in these two cases are very similar. In both cases, the jury was instructed that the proper standard of proof was that of clear and convincing evidence. The courts of civil appeals reversed the cases because they held that the stricter standard of beyond a reasonable doubt was required. In *Turner*, this court held that preponderance of the evidence was the proper standard of proof to be used in civil commitment cases. For the reasons expressed in *Turner*, we hold that it was error for the court of civil appeals in this case to require the State to prove

[1] TEX. REV. CIV. STAT. ANN. art. 5547 (1958).

each issue beyond a reasonable doubt. Since the jury found Addington to be mentally ill under a stricter standard than is required, the instruction given does not constitute harmful error.

Pursuant to Texas Rule of Civil Procedure 483, we grant the writ of error and, without hearing oral argument, reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

OPINION DELIVERED: October 12, 1977

IN THE SUPREME COURT OF TEXAS
FROM GALVESTON COUNTY
NINTH DISTRICT

No. B-6597

THE STATE OF TEXAS

v.

FRANK O'NEAL ADDINGTON

JUDGMENT—October 12, 1977

This day came on to be heard application of petitioner for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District having been duly considered, because it is the opinion of the Court that under Rule 483, Texas Rules of Civil Procedure, the application for writ of error is granted, and without hearing oral argument in the case, it is adjudged, ordered and decreed that there was error in the judgment of the Court of Civil Appeals which reversed and remanded the judgment of the trial court. Therefore, it is ordered that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the judgment of the trial court be, and thereby is, affirmed.

It is further ordered that respondent, Frank O'Neal Addington, and his sureties, J. M. Winter and L. G. Becknell both of AAA Bonding Agency, pay all costs expended and incurred in this Court and the Court of Civil Appeals, that petitioner, The State of Texas, have and recover of and from respondent, Frank O'Neal Addington, and his sureties, J. M. Winter and L. G. Becknell, all costs expended and incurred by it in said courts, and that this decision be certified to the Probate Court of Galveston County, Texas for observance.

* * * *

(Per Curiam Opinion)

* * * *

SUPREME COURT OF THE UNITED STATES

No. 77-5992

FRANK O'NEAL ADDINGTON, APPELLANT

v.

TEXAS

ON CONSIDERATION of the motion of appellant for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 17, 1978

SUPREME COURT OF THE UNITED STATES

No. 77-5992

FRANK O'NEAL ADDINGTON, APPELLANT

v.

TEXAS

APPEAL from the Supreme Court of Texas.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

April 17, 1978

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April 14 Conf

No. 77-5992

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

FRANK O'NEAL ADDINGTON, Appellant

v.

THE STATE OF TEXAS

Appeal from the Supreme Court of Texas

MOTION TO DISMISS

JAMES F. HURY,
CRIMINAL DISTRICT ATTORNEY
GALVESTON COUNTY, TEXAS

405 COUNTY COURTHOUSE
GALVESTON, TEXAS 77550
ATTORNEY FOR APPELLEE

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No. 77-5992

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

FRANK O'NEAL ADDINGTON, Appellant

v.

THE STATE OF TEXAS

I.

Appellee moves the Court to dismiss the appeal of Appellant on the ground that there exists no substantial Federal question.

II.

A. Statute Involved.

This appeal raises the question of the validity of a certain provision of the Texas Mental Health Code, TEX.REV.CIV.STAT.ANN. Art. 5547 (1958). The provision of the statute provides for an indefinite commitment of a person to a mental hospital. However, the burden of proof for such a commitment was not specifically stated in the statute.

B. Nature of the Case.

This is a civil commitment suit instituted by the State of Texas to indefinitely commit Respondent to a state hospital. The cause was tried before a jury in Probate Court, Galveston, Texas. The jury was instructed that the State's burden of proof was by clear, unequivocal, and convincing evidence. Respondent was committed. On appeal the Court of Civil Appeals reversed and remanded holding the State's burden was beyond a reasonable doubt. The Supreme Court of Texas held Court of Civil Appeals erred that the burden was by preponderance of the evidence.

III.

Argument

The appeal should be dismissed because there exists no substantial Federal question for the Court to decide. This indefinite commitment proceeding is a civil proceeding and Appellant agrees that it is civil. That being the case, the burden of proof in all civil proceedings has always been by the preponderance of the evidence.

Appellant contends that unless the reasonable doubt standard is applied, due process has been denied. Due process only requires procedural safeguards to be determined by the circumstances by weighing Governmental and private interest. Morissey v. Brewer, 408 U.S. 471 (1972). It was therefore concluded that no constitutional requirement for a reasonable doubt standard existed in temporary mental commitment hearings. Moss v. State, 539 S.W.2d 936; 943 (Tex.Civ.App.-Dallas, 1976 no writ). Later the Supreme Court of Texas held that the burden of proof in indefinite commitment hearings is by the preponderance of the evidence. State v. Turner, 556 S.W.2d 563 (Tex. 1977); Tippett v. Maryland, 436 F.2d 1153, 1158-59 (4th Cir. 1971), cert. dism'd sub nom; Murel v. Baltimore City Crim. Ct., 407 U.S. 355 (1972); In re Alexander, 372 F.2d 925 (D.C.Cir. 1967).

Appellant further argues that the reasonable doubt standard should be grafted onto indefinite civil commitment proceedings just as it was grafted onto juvenile proceedings. The distinguishing factor which sets juvenile proceedings apart from indefinite commitment proceedings is that juveniles commit acts of wrongdoing against other people. A person committed to a state hospital for indefinite commitment is there because of emotional problems, as opposed to commitment because of harm done to others.

Conclusion

For the reasons stated above the appeal should be dismissed.

Respectfully submitted,

James F. Hury,
Criminal District Attorney
Galveston County, Texas
405 County Courthouse
Galveston, Texas 77550
(713) 762-8621

Counsel for Appellee

No. 77-5992

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

FRANK O'NEAL ADDINGTON, Appellant

v.

THE STATE OF TEXAS

PROOF OF SERVICE

I, James F. Hury, the attorney for the State of Texas, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 20th day of March, 1978, I served two copies of the foregoing Motion to Dismiss on William P. Allison, attorney for Appellant, by mailing the copies in a duly addressed envelope, by certified mail, first class, postage prepaid and return receipt requested.

I further certify that all parties required to be served have been served.

James F. Hury,
Criminal District Attorney
Galveston County, Texas
405 County Courthouse
Galveston, Texas 77550
(713) 762-8621

ATTORNEY FOR THE STATE OF TEXAS

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee

ON APPEAL FROM THE SUPREME COURT OF TEXAS

BRIEF FOR THE APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,

Appellant

v.

THE STATE OF TEXAS,

Appellee

ON APPEAL FROM THE SUPREME COURT OF TEXAS

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the Supreme Court of Texas is unreported. It is reproduced in Appendix A to Appellant's Jurisdictional Statement, at A-1. The opinion of the Civil Court of Appeals of the Ninth Superior Judicial District of Texas is reported at 546 S.W.2d 105. The trial court rendered no opinion.

QUESTION PRESENTED

Whether a state statute providing for indefinite commitment to a mental hospital, which has been construed to permit a state to prove the criteria for

commitment by a standard of proof of less than beyond a reasonable doubt, is violative of the fifth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

On or about December 18, 1975, Appellant Frank O'Neal Addington and his mother argued, and his mother called the local sheriff. Appellant was arrested and jailed on a charge of "assault by threat," Tex. Penal Code Ann. tit. 5, §22.01(a)(2) (Vernon 1974), a Class "C" misdemeanor carrying a maximum punishment of a $200 fine with no provision for imprisonment. Tex. Penal Code Ann. tit. 3, §12.23 (Vernon 1974). (Statement of Facts 484, 487-88, Supp. Transcript 19)[1] Appellant was interviewed by the County's psychiatric examiner, who recommended that Appellant be committed. (Tr. 3) The criminal charges were dismissed and the State filed its petition for Appellant's indefinite commitment. (Appendix 3)

In accordance with the Texas Mental Health Code, the State was required to prove that Appellant was "mentally ill" and that he required hospitalization "for his own welfare and protection or the protection of others." Tex. Rev. Civ. Stat. Ann. art. 5547-52 (Vernon 1958) (Hereafter references to the Texas Mental Health Code will be cited as art. 5547-[appropriate section])

[1]In Texas the verbatim transcript of the trial is known as the "Statement of Facts." (Hereafter references to the verbatim record will be cited as "S.F.") The formal papers filed in Texas cases are compiled in the "Transcript." (Hereafter references to the formal papers are cited as "Tr.")

However, the petition for commitment did not specify whether commitment was sought for Appellant's own welfare or for the protection of others, or both.

Trial on the petition for Appellant's indefinite commitment was had before a six-person jury and lasted for five days. According to the evidence presented at the trial, Appellant had lived at home with his parents and two brothers until about the age of 20, when he left and served two years in the army. (S.F. at 63-64, 169-70) Following his discharge, about 1968, Appellant once again lived in the family home.

Appellant's mother and father testified for the State that, during the previous five or six years, Appellant had on occasion broken windows and china dishes, and had threatened "to get" his parents and to withhold support for them in their old age. (S.F. 62-106, 169-70) They also testified, however, that he had never followed through on these threats and that neither they nor others had been seriously injured by Appellant's actions. (S.F. 133, 212-13)

The State also presented testimony from two psychiatrists, including the County psychiatric consultant. They testified that the events leading to the instant commitment proceeding were part of a repeating pattern usually initiated by an argument between Appellant and his parents. The parents would then call the County sheriff, who would take Appellant to the County jail and file minor criminal charges—ranging from destruction of property to assault by threat—against him. Next the County psychiatric consultant would usually recommend Appellant's commitment (S.F. 472-73), the outstanding criminal charges would be dismissed, and commitment proceedings would be instituted in their place. (S.F. 581). The two psychia-

trists had similar diagnostic evaluations of Appellant—variations on the theme of schizophrenia— and stated that, in their opinion, Appellant was a danger to himself and others. (S.F. 352-97, 466-504)

Appellant presented a number of witnesses who vigorously opposed the State's position that Appellant was dangerous and required commitment for his own welfare and protection or the protection of others. He called several mental health professionals who had been working with Appellant and his family over the past several years. They testified that all of Appellant's alleged acts had arisen either within the context of a disturbed family, every member of which needed help, or while Appellant was in confinement. They testified that their efforts had been directed at helping Appellant to develop job skills, to break away from the family home, and to develop improved methods of communicating with his family. They testified that new programs, formerly non-existent, were available to Appellant which might ameliorate his condition and reduce his anti-social behavior. In any event, they testified, institutionalization of Appellant was not required because he was not dangerous to himself or others. (S.F. 664-905, 914-1000)

At the close of the evidence, the jury was instructed, over Appellant's objections (Appendix 8-9), to make its finding by "clear, unequivocal and convincing evidence." (Appendix 11-12) After four hours of deliberation, the jury emerged with a non-unanimous verdict, five of the six jurors concluding that Appellant required commitment. The Court entered an order committing Appellant for an indefinite period to Austin State Hospital in Austin, Texas, where he has remained since February 6, 1976, deprived of his

liberty, stigmatized as a "mentally ill" person, and suffering physical and psychological harm as a result of his confinement. He will remain in the institution until the "head of the hospital" determines that he "no longer requires hospitalization." Art. 5547-80. He bears the burden of challenging and proving the impropriety of such a determination. Art. 5547-82.

Had Appellant remained in the criminal justice system, the State would have been required to prove its case beyond a reasonable doubt to a unanimous jury and, if convicted, Appellant would have been subject only to a $200 fine. By instituting commitment proceedings, the State was able to prove the same set of facts by a lower standard of proof to a non-unanimous jury, placing Appellant in jeopardy of losing his liberty for the rest of his life.

Appellant appealed the trial court's decision to the Texas Court of Civil Appeals on the ground that he had been denied due process of law by, *inter alia*, the Court's failure to instruct the jury that the State must prove its case for commitment beyond a reasonable doubt. (Jurisdictional Statement D-10)[2] The Court of Civil Appeals reversed the trial court, holding that due process requires the State to prove its case beyond a reasonable doubt in indefinite commitment proceedings, and remanding the case for a new trial. (Appendix

[2]Appellant also urged in the Court of Civil Appeals that he had been denied due process by the trial court's failure to apply the right against self-incrimination and to instruct the jury that a decision to commit required finding (1) that Appellant posed "a real and substantial risk of immediate and serious bodily injury" and (2) that no less restrictive alternative to hospitalization existed.

18-20)[3]

The State then filed an Application for Writ of Error to the Texas Supreme Court, urging that the judgment in the Court of Civil Appeals be reversed. (Jurisdictional Statement D-19) While that Application was pending, the Texas Supreme Court decided the same issue in *State v. Turner*, 556 S.W.2d 563 (Tex. 1977), holding that due process does not require proof beyond a reasonable doubt, and that a mere preponderance of the evidence is a sufficient standard in involuntary commitment cases. The Texas Supreme Court simultaneously granted the State's application in the instant case and, without oral argument or briefs, reversed the judgment of the Court of Civil Appeals, affirming the trial court's judgment of commitment. (Jurisdictional Statement A1-2)[4]

Because the highest State court construed and applied a State statute to require only proof by a preponderance of the evidence in the face of Appellant's constitutional challenge to the statute, Appellant brought his appeal to this Court pursuant to 28 U.S.C. §1257(2). Probable jurisdiction was noted on April 17, 1978. 98 S. Ct. 1604 (1978).

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[3]The Court of Civil Appeals deemed it unnecessary to rule on the remaining issues presented by Appellant because it was able to decide the case on the standard of proof issue. (Jurisdictional Statement A-5)

[4]The other issues raised by Appellant in the Court of Civil Appeals were not presented in the Texas Supreme Court. In reversing the Court of Civil Appeals, and affirming the judgment of the trial court, the Texas Supreme Court has issued a judgment which is final for purposes of this Court's jurisdiction pursuant to 28 U.S.C. §1257. In the alternative, the Court can decide the instant appeal under the exceptions to §1257 enumerated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

SUMMARY OF THE ARGUMENT

This appeal requires the Court to decide whether persons may be involuntarily committed to a mental institution for an indefinite period where the criteria for confinement have not been established by proof beyond a reasonable doubt.

The test for determining when the Constitution requires proof beyond a reasonable doubt is contained in *In re Winship*, 397 U.S. 358 (1970). There the Court examined the impact of the consequences of the particular proceeding to the individual. It concluded that where, as a result of the proceeding, a person may lose his unconditional liberty through state-imposed confinement and be stigmatized, proof beyond a reasonable doubt is required. Thus, for purposes of determining the standard of proof where such drastic consequences are involved, the state's motives for instituting the process are irrelevant.

The individual consequences of involuntary commitment to a mental hospital more than satisfy the *Winship* test. Commitment is a massive curtailment of unconditional liberty. *See, e.g., Humphrey v. Cady*, 405 U.S. 504, 509 (1972). Confined mental patients suffer at least the same deprivation of rights and liberties as do prisoners. Indefinite commitment to a mental institution, like incarceration in a prison, restricts the individual's freedom of movement, privacy and autonomy, right to association and right to travel. Even though involuntary confinement is premised upon a treatment rationale, it may still result in serious harm to the institutionalized inmates. In many jurisdictions, confined mental patients are exposed to brutal, overcrowded, unsanitary and understaffed facilities

providing little more than custodial services while posing danger to life and limb. There is also the well-documented risk that patients will suffer deterioration of their intellectual, social and physical functioning as a direct result of confinement.

In addition to this total loss of unconditional liberty, involuntarily committed patients are severely stigmatized as a result of the commitment adjudication. As the recent report by the President's Commission on Mental Health stresses, the general public continues to be frightened and repelled by persons labeled "mentally ill." Upon discharge, former patients continue to face discrimination in housing, employment and education. Scientific surveys indicate that among the various disability groups, the mentally ill usually rank lowest in social acceptability—below ex-convicts.

Because involuntary commitment results in the deprivation of unconditional liberty and in severe social stigma, the due process test set forth in *Winship* is met. Proof beyond a reasonable doubt is therefore constitutionally required in commitment cases.

Notwithstanding this compelling analysis, the Texas Supreme Court, relying upon its recent decision in *State v. Turner*, 556 S.W.2d 563 (Tex. 1977), concluded that a mere preponderance of the evidence was sufficient to justify indefinite commitment. This conclusion has been unanimously rejected by every court that has considered the question, as well as by an increasing number of state legislatures. Indeed, although *Winship* made it clear that civil labels, difficulties with the proof, or the state's benevolent motives were insufficient reasons for excluding proceedings from the application of the beyond a reasonable doubt standard, the Texas Supreme Court nonetheless relied

precisely upon these arguments to justify its decision.

However, even if Texas properly considered such interests—a point not conceded by Appellant—it is manifest that legitimate State interests are not subverted by application of the beyond a reasonable doubt standard. *First*, requiring proof beyond a reasonable doubt in commitment cases will not adversely affect the informality, flexibility or speed of the adjudication because Texas law already requires a number of formal procedural safeguards. *Second*, there is no valid reason to believe that juries, perhaps aided by expert testimony, are less able to render appropriate verdicts in commitment cases than in criminal cases. This Court has already recognized that evidence of past conduct pointing to probable consequences—the same type of evidence necessary for proving the need for indefinite commitment—is susceptible to proof. *See Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274 (1940). *Third*, the alleged impracticality of the reasonable doubt standard is belied by its present use in a growing number of jurisdictions. *Fourth*, the Texas legislature itself has statutorily required proof beyond a resonable doubt before mentally retarded persons may be involuntarily committed. Certainly the legislature would not have required application of an "unworkable" standard of proof that would "thwart" its interest in committing persons in such closely analogous proceedings.

Thus, under either the *Winship* analysis or an alternative analysis which allows the State's interest to be balanced against the individual interest in determining the appropriate standard of proof, the conclusion is the same—Appellant was entitled to have the necessity of his involuntary commitment determined by proof beyond a reasonable doubt.

ARGUMENT

I. INTRODUCTION

This case presents the question whether persons may constitutionally be involuntarily committed to an institution for an indefinite period where the criteria for confinement have not been established by proof beyond a reasonable doubt.[5]

In deciding this single, narrow issue, the Court is not required to consider the substantive criteria upon which commitment decisions are based,[6] or the necessity for the application of procedural due process

[5]The precise question is a matter of first impression in this Court. *But see Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 356 (1972), which presented a similar issue in the context of "defective delinquent" proceedings; the writ was dismissed as improvidently granted. *See also United States ex rel. Stachulak v. Coughlin*, 424 U.S. 947 (1976).

[6]For purposes of this appeal Appellant assumes, without conceding, that the substantive criteria required by Texas, art. 5547-51, are constitutional. This Court has yet to rule on the constitutionality of the substantive standards for involuntary commitment; *cf. Jackson v. Indiana*, 406 U.S. 715, 728 (1972); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). The grounds generally advanced to justify involuntary commitment vary widely among states. *See Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1201-07 (1974) [hereinafter cited as "*Developments—Civil Commitment*"]. The appropriateness of the Texas standards is not before the Court in this appeal.

to involuntary commitment proceedings.[7] Nor is this case concerned with temporary or emergency commitments.[8]

The Texas Supreme Court summarily rejected Appellant's contention that the Constitution requires the State to prove beyond a reasonable doubt the need for confinement in involuntary commitment proceedings. The Texas court relied upon its recent decision in *State v. Turner*, 556 S.W.2d 563 (Tex. 1977), and concluded that a mere preponderance of the evidence was sufficient to justify indefinite confinement.[9]

In *Turner* the appellant had argued that because indefinite commitment to a mental hospital results in substantially the same deprivation of liberty as in criminal or juvenile commitments, the same standard of proof required in those cases by *In re Winship*, 397

[7]Texas has legislatively determined that respondents in involuntary commitment procedures are entitled to such safeguards as notice, counsel and trial by jury. Art. 5547-42 through -57. While this Court has never specifically addressed the need for procedural safeguards in involuntary commitments, it seems beyond question that due process requires at least these procedural protections. *Cf. In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967). According to the Chief Justice, "There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) (citations omitted).

[8]Most states permit the temporary or emergency detention of persons for whom there exists probable cause to believe that the standards for involuntary commitment are satisfied. *See Developments—Civil Commitment, supra* note 6, at 1202. Such statutes permit detention pursuant to summary procedures for a time-limited period, at the end of which the person is either released or given a formal hearing. Texas, for example, permits both "emergency" and "temporary" hospitalization. Art. 5547-27 to -39.

[9]The statute involved, art. 5547-51(a), is silent as to the required standard of proof. In such situations determination of the appropriate standard is a task traditionally performed by the judiciary. *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966).

U.S. 358 (1970), should apply. In support of its determination in *Turner*, however, the Texas court identified "several distinctions" between involuntary commitment and the "criminal proceedings" involved in *In re Winship*, and reasoned that such distinctions "justify the lesser standard." *Id.* at 566. The court held that the "mental patient's loss of liberty . . . is less severe than that suffered by the convicted criminal" because the involuntary mental patient is "entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others." *Id.* Moreover, even though personal liberty is at stake, that court held that "due process does not require, *ipso facto*, the highest standard of proof" because involuntary commitment furthers valid State objections "which should not be thwarted by application of a too strict burden of proof." *Id.* The court believed the reasonable doubt standard too strict because, given the inexact level of medical science, the State's ability to provide necessary treatment to persons in need would be unreasonably impaired. *Id.*

Basing its decision upon this attempt to distinguish involuntary commitment proceedings from criminal and juvenile cases, the Texas Supreme Court ruled that indefinite confinement could be constitutionally accomplished upon a simple preponderance of the evidence.[10] In mistakenly drawing these distinctions,

[10]The Texas Supreme Court explained in *Turner* that the standard of "clear, unequivocal and convincing evidence" does not exist in Texas jurisprudence as an intermediate standard of proof for the factfinder. 556 S.W.2d at 565. Inasmuch as the trial court applied the standard of "clear, unequivocal and convincing evidence" in this case, a ruling by this Court that requires a higher standard of proof than a preponderance of the evidence, but which does not specifically require proof beyond a reasonable doubt, would necessitate a remand to the Texas Supreme Court for clarification of the appropriate standard of proof within the guidelines to be established by this Court.

the Texas court has misinterpreted this Court's prior rulings and has relied upon reasoning specifically rejected by this Court in other cases concerning the process that is due where unconditional personal liberty and stigma have been at stake.

II. INVOLUNTARY COMMITMENT RESULTS IN THE COMPLETE LOSS OF CONSTITUTIONALLY PROTECTED LIBERTY AND IN SOCIAL STIGMATIZATION.

In *In re Winship*, 397 U.S. 358 (1970), this Court, in determining the standard of proof constitutionally required in a juvenile case, examined the impact of the consequences of the proceeding on the individual. It concluded that because the individual is exposed "to a complete loss of his personal liberty through a state-imposed confinement," and because a delinquency adjudication is a state-imposed label of stigma, the highest standard of proof must be applied. 397 U.S. at 363-64, 374. Thus the Court held that where these factors are present the criminal standard of proof beyond a reasonable doubt is applicable to proceedings otherwise labeled as "civil."

The Texas Supreme Court recognized that Appellant's unconditional liberty would be lost as a result of his involuntary confinement. It reasoned in *Turner* that because Texas statutorily accords its patients post-confinement rights to treatment, periodic review of their conditions, and release when the commitment criteria are no longer satisfied, their loss of liberty is "less severe" than that of persons convicted of adult or

juvenile offenses. *State v. Turner*, 556 S.W.2d 563, 566 (Tex. 1977). The Texas court did not address the social stigma that attaches to a determination of involuntary commitment. As will be demonstrated, however, the *Winship* principles may not be so easily discarded.

A. Involuntary Commitment Results in the Complete Loss of Personal Liberty.

The purported distinction between penal confinement and confinement pursuant to involuntary hospitalization pales beside one central common fact: the result of each process is the total denial of unconditional liberty. The liberty at risk is freedom from physical restraint, and its loss occurs upon any involuntary confinement in an institution. *In re Gault*, 387 U.S. 1, 50 (1967).

Just as confinement in a modern, physically attractive institution is as much a deprivation of liberty as incarceration in an antiquated facility—be it a hospital, prison or juvenile facility—the availability of post-confinement rights does not diminish the total restraint upon individual liberty suffered by persons who are confined. Stretched to its illogical extreme, the Texas Supreme Court's distinction would suggest that prisoners have not lost their unconditional liberty because this Court has held them constitutionally entitled to certain post-conviction rights, or because legislatures have generally statutorily provided them with rehabilitation programs or means for parole and/or early release. *Winship* does not turn on the subtle analysis of post-deprivation rights. The constitutional right to freedom is too precious to demean by such a test. As this Court has held,

> Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration. The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken.

Breed v. Jones, 421 U.S. 519, 530 n.12 (1975).

Moreover, even if the post-confinement rights of the incarcerated were relevant to the standard of proof, a realistic comparison shows that confined mental patients have no greater rights than prisoners.[12] Indefinite commitment to a mental institution—like a prison—restricts the individual's freedom of movement and severely limits the exercise of an array of fundamental rights, such as the right to privacy and autonomy, *Roe v. Wade*, 410 U.S. 113 (1973); the right to association, *Shelton v. Tucker*, 364 U.S. 479 (1960); and the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969).[13]

Similarly, the exercise of a patient's basic rights—to communicate, to practice his religion, to keep confidential his hospital records or to receive visitors—is subject, like that of prisoners, to the regulation of

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[12]In Texas even the purposes of criminal and involuntary commitment are strikingly similar. Mental patients are institutionalized to obtain "needed care, treatment and rehabilitation." Art. 5547-21. Juveniles are to receive "a program of treatment, training, and rehabilitation . . ." Tex. Fam. Code Ann. tit. 3, §51.01(3) (Vernon 1975), while one of the primary goals of the adult corrections system is "the rehabilitation of those convicted of violations of this code." Tex. Penal Code Ann. tit. 3, §1.02(1)(B) (Vernon 1974).

[13]The constitutionality of the deprivations discussed in this section is *not* before the Court in this case. They are identified here only to demonstrate the total deprivation of liberty that results from commitment.

treatment personnel. Art. 5547-86, -87. *Cf. Wolff v. McDonnell*, 418 U.S. 539 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974). Like prisoners, *cf. Meachum v. Fano*, 427 U.S. 215 (1976), patients may be summarily transferred without their consent to any other state hospital for any reason. Art. 5547-73(a). Like prisoners, should patients leave the institution without authority, any health or peace officer may detain them. Art. 5547-72(b). Committed persons who are not Texas residents may be summarily returned, without their consent, to their original state of residence. Art. 5547-16(a).

Like prisoners, committed persons may be conditionally released from the institution. Art. 5547-79. However, unlike prisoners, their furloughs are statutorily subject to revocation by the head of the hospital without notice or hearing. *Id. Cf. Morrissey v. Brewer*, 408 U.S. 471 (1972).

Daily life in a mental hospital is not dissimilar from life in a prison. Both prisons and mental hospitals are usually large institutions concerned with custody and security. Indeed, in Texas, prisoners who are transferred to mental hospitals for treatment are given full credit on their sentences for the time spent there. Tex. Code Crim. Proc. Ann. art. 46.01(8) (Vernon Supp. 1966-67). Both prisons and hospitals are governed by the same immense discretion of the institutional staff, including non-professional attendants who generally have the most direct contact with the inmates. Patients and prisoners are dependent upon this staff for such simple amenities as cigarettes, toiletries or access to a television, and these privileges may be withdrawn without notice. Their living areas may be searched without warrant for contraband. They may be required

to perform institution-maintaining labor without compensation. Violations of institutional rules and policies—which themselves are often vague, inconsistent and unevenly applied—may result in placement in seclusion rooms, or in the use of physical or chemical restraints. Art. 5547-71. *See, e.g.*, Ferleger, *Loosing The Chains: In-Hospital Civil Liberties of Mental Patients*, 13 Santa Clara Law. 447 (1973); E. Goffman, *Asylums* (1961).

In some instances confined mental patients may have *fewer* rights than prisoners. Commitment impairs the patient's legal right to make decisions about personal medical care while in the facility. The head of the hospital is statutorily authorized to provide psychiatric treatment to committed patients. Art. 5547-70. This treatment is permitted even in the absence of consent. Tex. Rev. Civ. Stat. Ann. art. 3174b-2 (Vernon 1968). Furthermore, while confined, patients may be forced to take drugs or to undergo other types of treatments that produce harmful side effects. *See* Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right To Refuse Treatment*, 72 Nw. U.L. Rev. 461, 474-79 (1978).

Moreover, although involuntary confinement is premised upon the assumption that benevolent institutions will provide treatment, it may actually result in serious harm to individuals. In too many jurisdictions people are exposed to brutal, overcrowded, unsanitary and understaffed facilities which provide, at best, little more than custodial services. As the President's Commission on Mental Health recently reported, "We are keenly aware that even the best intentioned efforts to deliver services to mentally disabled persons have historically resulted in well-documented cases of

exploitation and abuse." 1 President's Commission on Mental Health, Report to the President 42 (1978). One federal court considering conditions in state institutions has written that "[t]he gravity and immediacy of the situation cannot be overemphasized. At stake is the very preservation of human life and dignity." *Wyatt v. Stickney*, 344 F. Supp. 387, 394 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). Another federal court observed that the "failure to protect the physical safety" of residents in a state institution resulted in "the loss of an eye, the breaking of teeth, the loss of part of an ear bitten off by another resident, and frequent bruises and scalp wounds . . . ." *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973).[14]

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[14]Conditions in large state mental hospitals have historically been inadequate at best. *Jackson v. Indiana*, 406 U.S. 715, 734-35 & n.17 (1972). There are "substantial doubts about whether the rationale for pretrial commitment—that care or treatment will aid the accused in attaining competency—is empirically valid given the state of most of our mental institutions." *Id. See O'Connor v. Donaldson*, 422 U.S. 563, 569 (1975); American Bar Foundation, The Mentally Disabled and the Law 417-18 (S. Brakel & R. Rock eds., rev. ed. 1971); American Psychiatric Association, Task Force on the Right to Care and Treatment, The Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded 1 (Final Draft, May 1975); A. Deutsch, The Mentally Ill in America (2d ed. 1949); A. Deutsch, The Shame of the States (1948); E. Goffman, Asylums (1961); Joint Commission on Mental Illness and Health, Action for Mental Health (1961); Joint Information Service of the American Psychiatric Association and the National Association for Mental Health, Fifteen Indices: An Aid in Reviewing State and Local Mental Health and Hospital Programs 6 (1966); Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, 115 Am. J. Psych. 1 (1958).

There is also a real potential that patients, even in humane institutions, will actually suffer deterioration of their intellectual, social and physical functioning as a direct result of confinement. This deterioration results from patients being treated in routinized, impersonal ways. Because they are economically unproductive, their job skills decline. The longer these patients remain in the institution, the more dependent on the institution they become, exhibiting flatness of response, withdrawal, muteness and loss of motivation. This phenomenon—known as "institutionalization"—has been widely documented in medical and social science literature.[15]

As has been demonstrated above, the liberty interests at risk for a person about to be involuntarily committed are at least equivalent to those lost by penal

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[15]*See, e.g.*, R. Barton, Institutional Neurosis (1966); I. Belknap, Human Problems of State Mental Hospitals (1956); E. Goffman, Asylums (1961); Gruenberg, *The Social Breakdown Syndrome—Some Origins*, 123 Am. J. Psych. 1481 (1967); Kantor & Gelineau, *Making Chronic Schizophrenics*, 53 Mental Hygiene 54 (1969); M. Schwartz & C. Schwartz, Social Approaches to Mental Patient Care (1964); Smith, *Experiencing Dehumanization in the Role of a Patient*, Mental Hugiene, Winter 1972, at 75; Wing, *Institutionalism in Mental Hospitals*, 1 Brit. J. Soc. & Clinical Psych. 38 (1962); and J. Wing & G. Brown, Institutionalism and Schizophrenia: A Comparative Study of Three Hospitals (1970). *See also* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1108, 1126-29 (1972); Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. 18, 43-44, 124, 637 (1961).

or juvenile incarceration.[16] These interests are not diminished by the state's benevolent intent to provide care and treatment—particularly where that "treatment" is itself of questionable value.

B. Involuntary Commitment as a "Mentally Ill" Person Results in Social Stigmatization.

In addition to the complete loss of liberty resulting from involuntary commitment, a decision to commit infringes a second constitutionally protected liberty—the individual's interest in his reputation and standing in society. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). In its conclusions below, however, the Texas Supreme Court failed to recognize the substantial stigma that accompanies involuntary commitment.

"Stigma" is a token of infamy, disgrace or reproach that "might seriously damage [a person's] standing and associations in [his] community." *Board of Regents v. Roth, supra*, 408 U.S. at 573. Committed persons "may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more

[16]In Texas the total deprivation of one's liberty is compounded because the jury is also permitted to find proposed patients legally incompetent, rendering them civilly "dead." Art. 5547-51(c). Persons adjudicated incompetent are not permitted to vote, Tex. Const. art. 6, §1; to serve on juries or testify as witnesses, Tex. Code Crim. Proc. Ann. art. 35.16(a), 38.06(1) (Vernon 1966); or to initiate certain types of civil actions, *Clarady v. Mills*, 431 S.W.2d 63 (Tex. Civ. App. 1968) (divorce). In this case the State failed to plead this Appellant's incompetence. Thus the trial court properly excluded evidence, and did not instruct the jury, on this issue. However, because the actual order of commitment filed by the trial court indicates that Appellant was nonetheless adjudged incompetent (*see* Appendix 20), there exists some confusion with regard to Appellnat's legal competence. This clerical error should be corrected upon remand to the State courts.

severe consequences than do the formally imposed disabilities." *Developments-Civil Commitment, supra* note 6, at 1200. The recent Report to the President from the President's Commission on Mental Health found the general public frightened and repelled by the term "mental illness." 1 Report to the President, *supra*, at 55. The Commission specifically noted that fears about people who have been confined in state hospitals still abound, and that, upon discharge, former patients continue to face discrimination in housing, employment and education. *Id.*[17]

The Commission's Task Panel on Public Attitudes and Use of Media for Promotion of Mental Health (Appendix-Vol. IV at 1867), reported that "ignorance, prejudice, and fear of 'mental illness' and the 'mentally ill' remain widespread throughout America." It attributed much of this stigma to the continuing uncertainty about the causes and cures of mental illness. It found that the general public, often influenced by news accounts in the popular media, equates mental illness with violent and anti-social behavior. *Id.*[18]

The American Psychiatric Association has identified fear of this stigma as a significant barrier to treatment for people who might otherwise seek necessary services. According to its official *Position Statement*

[17]*See also* Sarbin & Mancuso, *Failure of a Moral Enterprise: Attitudes of the Public Toward Mental Illness*, 35 J. Consulting & Clinical Psych. 159 (1970); Fracchia, *et al., Public Views of Ex—Mental Patients: A Note on Perceived Dangerousness and Unpredictability*, 38 Psych. Rep. 495 (1976).

[18]This negative public attitude is likewise reflected in the broad range of civil disabilities legislatively imposed upon persons labeled "mentally ill." *See* Section II.A, note 16, *supra*; Note, *Mental Illness: A Suspect Classification?*, 83 Yale L.J. 1237 (1974).

on Discrimination Against Persons with Previous Psychiatric Treatment, 135 Am. J. Psych. 643, 643 (1978), "[k]nowledge of previous psychiatric treatment and/or the possession of a psychiatric label is . . . used prejudiciously to exclude individuals, as if society's institutions were attempting to protect themselves against what is felt to be a threat."[19]

The degree of stigmatization increases proportionately with the level of treatment and official intervention. Thus, while social stigma attaches even to voluntary patients who privately consult therapists, inpatient hospitalization for mental disorder results in a correspondingly higher stigma.[20] Moreover, there is evidence to indicate that doctors are more likely to rehospitalize a former patient than they are to hospitalize a person who has not previously been an inpatient.[21]

[19]Third-party knowledge of previous treatment emanates from a variety of sources. Computers store vast amounts of personal data. Applications for jobs, loans, scholarships, insurance, licenses, and government benefits routinely request information about mental hospitalization. Even where such questions are not directly asked, applicants are at a loss to explain away large gaps in their employment or educational histories. In Texas, the head of the hospital is statutorily authorized to release patients' records without need for the consent of the affected individual. Art. 5547-87(a)(4). *See generally* American Psychiatric Association, Task Force Report 9, Confidentiality and Third Parties (1975); N. Spingarn, Confidentiality: A Report of the 1974 Conference on Confidentiality of Health Records (1975); *Whalen v. Roe*, 429 U.S. 589 (1977); *Anonymous v. Kissinger*, 499 F.2d 1098 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *Spencer v. Toussaint*, 408 F. Supp. 1067 (E.D. Mich. 1976).

[20]Bord, *Rejection of the Mentally Ill: Continuities and Further Developments*, 18 Soc. Prob. 496 (1971).

[21]Mendel & Rapport, *Determinants of the Decision for Psychiatric Hospitalization*, 20 Archives Gen. Psych. 321 (1969).

Institutionalization of a mentally ill person often produces negative expectations in those with whom the person later comes into contact. For example, studies indicate that potential employers are reluctant to hire former patients because they believe that such employees cause problems, require increased supervision and are able to accept fewer employment responsibilities.[22] The general social relations of many recently discharged patients "are often characterized by social distance, distrust, or denial of employment."[23]

Although some progress in public awareness has been made,

> it is quite insufficient, and arbitrary discrimination in the main continues. For example, it remains difficult for former patients of public mental hospitals everywhere to obtain employment. Scapegoating and discrimination have psychological, social, and cultural impacts on family, individuals, and institutions.

APA Statement on Discrimination, supra, at 643. The ex-patient's experiences result in a negative self-concept and a loss of self-confidence and esteem. Society's expectations become self-fulfilling prophecies. E. Goffman, *Asylums* 354-56 (1961).

The stigma which attaches to formerly committed patients is certainly as great as that associated with the ex-offender—both have been officially labeled societal

[22]Howard, *The Ex-Mental Patient as an Employee*, 45 Am. J. Orthopsych. 479, 479-80 (1975).

[23]Whatley, *Social Attitudes Toward Discharged Mental Patients*, in The Mental Patient: Studies in the Sociology of Deviance 401 (S. Spitzer & N. Denzin eds. 1968). *See also* Phillips, *Rejection: Possible Consequence of Seeking Help for Mental Disorders*, in Mental Illness and Social Processes (T. Scheff ed. 1967).

deviants in need of institutionalization.[24] In fact, scientific surveys indicate that among the various disability groups, the mentally ill usually rank the lowest in social acceptability—even *below* ex-convicts.[25]

III. BECAUSE INVOLUTARY COMMITMENT RESULTS IN THE TOTAL DEPRIVATION OF LIBERTY AND IN SEVERE SOCIETAL STIGMA, THE DUE PROCESS TEST SET FORTH IN *WINSHIP* REQUIRES APPLICATION OF THE HIGHEST STANDARD OF PROOF.

In every trial there exists a potential for error in the fact-finding process. *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). The standard of proof by which the parties must establish their cases reflects the risk of error that society is willing to tolerate in that given proceeding. As the seriousness of the consequences

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[24]In Texas many of the civil disabilities imposed against mental patients closely parallel those applicable to persons convicted of felonies. *See, e.g.*, Tex. Const. art. 6, §1 (prohibits "idiots," "lunatics," and "persons convicted of any felony" from voting); Tex. Code Crim. Proc. Ann. art. 35.16(a)(4) (Vernon Supp. 1978) (persons convicted of felony and persons who are "insane" or have "mental defects" may not serve on juries).

[25]Harasymiw, *et al., A Longitudinal Study of Disability Group Acceptance*, 37 Rehabilitation Literature 98 (1976). *See also* Brand & Claiborn, *Two Studies of Comparative Stigma: Employer Attitudes and Practices Toward Rehabilitated Convicts, Mental and Tuberculosis Patients*, 12 Community Mental Health J. 168 (1976) (no significant difference between ex-convict and ex-patient); Tringo, *The Hierarchy of Preference Toward Disability Groups*, 4 J. of Special Educ. 295 (1970).

resulting from an erroneous judgment increases for the person subject to loss of liberty or property interests, a higher standard of proof is required to guard against the potential error.[26]

Where an individual's unconditional liberty is at stake—a personal interest of "transcending value," *In re Winship*, 397 U.S. at 364—the risk of an erroneous judgment is so great for the individual that this Court has required the State, as a matter of due process, to bear the consequences of an error by proving its case beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364, 368.[27] This conclusion reflects a fundamental philosophy of our legal system that, because wrongful confinement is so abhorrent, it is preferable to allow a

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[26]At common law the need for a higher standard of proof has been recognized in cases where there was thought to be a special danger of deception, or a special need to protect favored social policies. *See* C. McCormick, Handbook on the Law of Evidence §321, at 681 (1954). This Court has applied a similar rule. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958), in which the Court held that when noncriminal tax assessment procedures deterred the constitutional right to free speech, due process required the State to justify its action with "sufficient proof." *Id.* at 529. Likewise a plurality of the Court believed the risk of error in libel cases threatened first amendment interests, justifying a standard greater than preponderance of the evidence. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). In cases arising under federal statutes the Court has rejected preponderance of the evidence where government actions had a significant impact on important individual interests. *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966); *United Mine Workers v. Gibbs*, 383 U.S. 715, 739 (1966).

[27]*Patterson v. New York*, 432 U.S. 197 (1977), did not change this rule, and is not applicable here. *Patterson* upheld the constitutionality of the state's shifting to a criminal defendant the burden of proving his affirmative defense. *Cf. Mullaney v. Wilbur*, 421 U.S. 684 (1975). It did not disturb the *Winship-Mullaney* requirement that the state bear the burden of proving its original allegations beyond a reasonable doubt.

number of guilty people to go free rather than to confine erroneously a single innocent individual. That same tenet governs decisions to involuntarily commit persons to mental institutions. A distinguished commentator has written that the plight "of one who is falsely found insane and relegated to life imprisonment is beyond conception. No greater cruelty can be committed in the name of the law." 5 Wigmore, Evidence §1400 (3d ed. 1940).

In *Winship* the state argued that juvenile proceedings should be exempt from the higher standard of proof because they were noncriminal matters intended for the benefit of the youth involved. According to the state, guilt or innocence was not the point. Rather the central issue was the juvenile's need for treatment and rehabilitation. Proof beyond a reasonable doubt, the state concluded, would destroy the juvenile system's legitimate and beneficial purposes. 397 U.S. at 365-66.

The Court held, however, that where individuals are threatened with the complete loss of their unconditional liberty and exposed to accompanying stigma, the highest standard of proof is constitutionally "indispensible." 397 U.S. at 364. In rejecting the state's arguments for a lower standard, the Court adhered to its conclusions in *In re Gault*, 387 U.S. 1, 37 (1967), that lesser standards cannot be justified simply because the proceeding is labeled noncriminal, or because its purposes are beneficent. 397 U.S. at 365-66. What matters constitutionally is the potential result—loss of liberty and stigma—and not the benevolent motivations of the state.

The same reasoning which was rejected by this Court in *Winship* is the essence of the Texas Supreme Court's

decision in the *Turner* case. Under the *Winship* analysis it is irrelevant that the state acts with paternalistic intent, or that the state's case may be difficult to prove beyond a reasonable doubt, or that the particular proceeding is labeled civil rather than criminal. The only question a court need answer is whether the individual is threatened with the total loss of his unconditional liberty and an accompanying social stigma. Where these interests are at stake, as here they most certainly are, due process requires proof beyond a reasonable doubt.

The Texas Supreme Court's conclusion that evidence beyond a reasonable doubt is not required to justify involuntary commitment is clearly untenable after *Winship*. It is also contrary to the great weight of the decisional law.[28] Moreover, eight states have

[28]Numerous courts have required proof beyond a reasonable doubt in involuntary commitment proceedings. *See In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Hawaii 1976); *Davis v. Watkins*, 384 F. Supp. 1196, 1199 (N.D. Ohio 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975) *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); *In re Hodges*, 325 A.2d 605 (D.C. 1974); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964); *Superintendent of Worcester State Hospital v. Hagberg*, 372 N.E.2d 242 (Mass. 1978); *Lausche v. Commissioner of Public Welfare*, 225 N.W.2d 366 (Minn. 1974) (proof beyond a reasonable doubt for initial commitment); *Proctor v. Butler*, 380 A.2d 673 (N.H. 1977); *In re Heukelekian*, 94 A.2d 501 (N.J. Super. Ct. App. Div. 1953); *State v. O'Neill*, 545 P.2d 97 (Or. 1976); *In re Alexander*, 554 P.2d 524 (Or. Ct. App. 1976); *In re Levias*, 517 P.2d 588, 590 (Wash. 1973) (clear, cogent and convincing evidence is the civil analogue to beyond a reasonable doubt). Other courts have required proof beyond a reasonable doubt in related proceedings: *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976) (reasonable doubt for commitment under Sexually Dangerous Persons Act where state seeks

(continued)

statutorily adopted beyond a reasonable doubt as the proper standard.[29]

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an indeterminate sentence in lieu of a criminal prosecution if the person is charged with a criminal offense and is believed to be sexually dangerous); *People v. Burnick*, 535 P.2d 352, 121 Cal. Rptr. 488 (1975) (reasonable doubt for indeterminate confinement of "mentally disordered sex-offender"); *People v. Pembrock*, 320 N.E.2d 470 (Ill. Ct. App. 1974) (reasonable doubt for commitment of person as sexually dangerous); *In re Andrews*, 334 N.E.2d 15 (Mass. 1975) (reasonable doubt for person committed for indeterminate period as a sexually dangerous person). *But see Sabon v. People*, 350 P.2d 576 (Colo. 1960) (preponderance approved in dicta); *Fhagen v. Miller*, 317 N.Y.S.2d 128 (Sup. Ct. 1970), *aff'd*, 321 N.Y.S.2d 61 (App. Div. 1971) (preponderance standard acceptable in *temporary* commitment).

State and federal courts have unanimously rejected the preponderance rule, although some have adopted the intermediate standard of proof by clear and convincing evidence. *See Stamus v. Leonhardt*, 414 F. Supp. 439 (S.D. Iowa 1976); *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Dixon v. Attorney Gen.*, 325 F. Supp. 966 (M.D. Pa. 1971); *In re Beverly*, 342 So. 2d 481 (Fla. 1977); *In re Stephenson*, 367 N.E.2d 1273 (Ill. 1977); *People v. Sansone*, 309 N.E.2d 733 (Ill. Ct. App. 1974); *In re Hatley*, 231 S.Ed.2d 633 (N.C. 1977); *State v. Valdez*, 540 P.2d 818 (N.M. 1975); *Commonwealth ex rel. Finken v. Roop*, 339 A.2d 764 (Pa. Super. Ct. 1975); *In re Ward M.*, 533 P.2d 896 (Utah 1975); *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109 (W. Va. 1974). According to the Texas Supreme Court, however, this alternative is unavailable in Texas, because "Texas Courts review evidence by but two standards"—preponderance of the evidence or beyond a reasonable doubt. *State v. Turner*, 556 S.W.2d 563, 565 (Tex. 1977). Ironically, that court, in renouncing the highest standard in favor of the preponderance rule, relied exclusively upon the decisions of two jurisdictions which advocate the clear and convincing standard. 556 S.W.2d at 566.

[29]At least eight states statutorily provide for proof beyond a reasonable doubt in involuntary commitment: Hawaii (Haw. Rev. Stat. §334-60(b)(4)(I) (Supp. 1977)); Idaho (Idaho Code §66-329 (1973 & Cum. Supp. 1977)); Kansas (Kan. Stat. Ann. §59-2917 (1976)); Montana (Mont. Rev. Codes Ann. §38-1305(7) (Cum. Supp. 1977)); Oklahoma (Okla. Stat. Ann. tit. 43A, §54.1(C) (West Cum. Supp. 1977)); Oregon (Or. Rev. Stat. §526.130 (1977)); Utah (Utah Code Ann. §64-7-36(6) (1978)); and Wisconsin (Wis. Stat. Ann. §51.20 (West Supp. 1977)).

The State, in indefinitely depriving this Appellant of his unconditional liberty and imposing upon him a lifelong badge of infamy, may not escape the necessity for proving its case by proof beyond a reasonable doubt simply by posting a "hospital" sign atop its institution.

IV. EVEN IF A BALANCING OF THE COMPETING INTERESTS IS CONSTITUTIONALLY PERMISSIBLE, THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT WILL NOT "THWART" LEGITIMATE STATE OBJECTIVES.

The Texas Supreme Court, in refusing to apply the reasonable doubt standard to involuntary commitments, blatantly ignored this Court's analysis in *Winship*. It justified its decision on the grounds that the highest standard of proof would thwart legitimate state objectives. But, as explained in the preceding section, the State's alleged interests in a lower evidentiary standard are simply irrelevant under the *Winship* test.[30]

[30]The Texas court's reasoning is also inconsistent with the alternative analysis proposed by Justice Harlan in his concurring opinion in *Winship*. He believed that applicable standards of proof should not be determined solely by individual liberty interests, but rather by reference to the "comparative social costs of erroneous factual determinations" to the state as well as to the individual. 397 U.S. at 370. His balancing of the interests there led Justice Harlan to agree with the majority that the consequences to an erroneously committed juvenile far outweigh the costs to the state in permitting a juvenile delinquent to go free. *Id.* at 374. Appellant believes that this case is controlled by the majority decision in *Winship*. But, as will be demonstrated in this section, both Justice Harlan's analysis and the balancing of competing interests analysis subsequently employed by this Court in making procedural

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Even if the State's interests are relevant, however, the Texas court's conclusion that the State's interests would be impermissibly thwarted is clearly erroneous. *First*, application of the beyond a reasonable doubt standard will have no "discernable effect upon the [commitment] proceedings themselves." *In re Ballay*, 482 F.2d 648, 663 (D.C. Cir. 1973). Use of the standard will not "remake" the process, *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971), because the Texas legislature has already determined that persons subject to commitment are entitled to such procedural safeguards as a hearing, representation by counsel, and trial by jury. The addition of the beyond a reasonable doubt standard will have no "effect on the informality, flexibility, or speed of the hearing at which the fact-finding takes place." *In re Winship*, 397 U.S. at 366.[31]

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due process determinations, *see, e.g., Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Morrissey v. Brewer*, 408 U.S. 471 (1972), lead to the conclusion that proof beyond a reasonable doubt is required in involuntary commitment cases. The Texas Supreme Court overweighted the State's interests and failed to adequately consider the individual interests in its decision.

[31]The requirement of proof beyond a reasonable doubt does not impede the State's ability to exercise its emergency police powers *prior* to a hearing, art. 5547-38, nor will it interfere with the State's interest in providing individualized treatment *after* adjudication, art. 5547-70, because the standard of proof is applicable only to the actual adjudication of mental illness and the need for hospitalization. Further, in those instances in which the need for immediate care or restraint before or during the hearing is warranted, Texas statutorily permits such interim custody and treatment. Art. 5547-67.

The argument that the person undergoing commitment will suffer "trauma" which will "aggravate" his or her condition is also inapplicable, for any potential "trauma" would be "wholly unaffected by the burden of proof." *In re Ballay, supra*, 482 F.2d at 663. The Texas legislature, by providing a full hearing process, has already made a *(continued)*

Second, the primary concern of the court below was that the State's interests in protecting and treating its citizens through involuntary commitment would be thwarted because the inexactitudes of medical knowledge render it impossible for a jury to make the required judgment beyond a reasonable doubt. It noted what it termed a "significant difference" between a jury's ability to make a "retrospective assessment" of facts in a criminal case as opposed to the determination of mental illness and "future conduct and future need" to be made at a commitment hearing. *State v. Turner, supra*, 556 S.W.2d at 566. These "problems inherent in methods of proof" were used to justify the "alteration" of "rules of law." *Id.*

Constitutional "rules of law" may not be so easily "altered." Under *Winship* a state cannot relax the standard of proof simply because the proof is difficult. The standard is *designed* to be difficult. "[T]he reasonable doubt standard is designed particularly to partially offset [infirmities in the substantive proof] by reducing the risk of factual error." *In re Ballay, supra*, 482 F.2d at 667. *United States ex rel. Stachulak v. Coughlin, supra*, 520 F.2d at 936. Consequently, if the unreliability of psychiatric diagnoses and predictions has any relevance to the standard of proof, it is in requiring the state to satisfy the highest standard before basing deprivations of liberty on such speculative information.

(footnote continued from preceding page)
determination in favor of procedural protection over the risk of "trauma." In addition, Texas law minimizes any supposed "harmful effect" resulting from the hearing by permitting it to be held in suitable physical locations and by permitting proposed patients to voluntarily absent themselves. Art. 5547-49. The proposed patient may also act to minimize any potential "trauma" by waiving a jury trial, art. 5547-48, by stipulating to certain factual matters, and by agreeing voluntarily to enter the hospital.

Moreover, the supposed "problems inherent in methods of proof" in commitment cases may be more imaginary than real. The evidence actually considered is not exclusively limited to experts' speculative predictions.[32] At Appellant's trial in this case, for example, there was extensive testimony adduced by both parties from both lay and expert witnesses about his past behavior, his family relationships, and his mental state. With reference to an analogous "psychopathic personality" statute, this Court has already upheld a standard which required proof of a "habitual course of misconduct in sexual matters" such that the person is likely to injure others. According to the Court, that statute called for "*evidence of past conduct* pointing to probable consequences," which was "as *susceptible of proof as many of the criteria constantly applied in prosecutions for crime.*" *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274 (1940) (emphasis supplied). There is simply no valid reason to believe that juries, using such evidence and perhaps aided by expert testimony, are less able to render appropriate verdicts in commitment cases than in criminal or quasi-criminal cases.

[32]Even the information that typically forms the basis for experts' opinions is familiar to, and capable of being understood by, a lay judge or jury. The psychiatrist typically utilizes "[a]ll material available in making any kind of evaluation . . . . These sources include relations, spouse, people close at hand at the scene, any police reports and interviews with police officers who made up the reports." R. Sadoff, Forensic Psychiatry 104 (1975); *see also* Rubin, *The Psychiatric Report*, in Readings in Law and Psychiatry 125 (Allen, Ferster & Rubin eds. 1975). In addition, each of these persons and reports—the "collateral sources"—may be called as witnesses or introduced into evidence. *See, e.g.*, Zander, *Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt*, 1976 Wis. L. Rev. 503, 524-26.

Third, the alleged impracticality of the reasonable doubt standard is further belied by the fact that it is presently in operation in at least thirteen jurisdictions, eight as the result of statutory enactments.[33] Appellant has been unable to find a single report documenting an adverse impact on state interests in any of these jurisdictions.

In Wisconsin, for example, the beyond a reasonable doubt standard was initially required by court decision in *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1974), *vacated*, 414 U.S. 473 (remanded for more specific order), *more specific order entered*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975) (remanded for reconsideration of the abstention principle), *order reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976); and later codified by the legislature, Wis. Stat. Ann. §51.20. A study of *Lessard*'s actual implementation reports that although the decision was initially "criticized as unworkable by some [*Lessard*'s mandates, including the reasonable doubt standard] are feasible and manageable." Zander, *Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt*, 1976 Wis. L. Rev. 503, 508. "The dire prediction that [the extensive safeguards required by *Lessard*] would lead to hundreds of mentally ill persons 'dying with their rights on' has not come to pass [in Wisconsin]." *Id.* at 559.

Statistics from Hawaii, which amended its code to require evidence beyond a reasonable doubt in accord with the decision in *Suzuki v. Quisenbury*, 411 F. Supp. 1113 (D. Hawaii 1976), indicate that between May 1976 and March 1978 there were 251 petitions filed for

[33]*See* notes 28 and 29 *supra*.

involuntary commitment to the Hawaii State Hospital. Of that number, hearings were actually held in 167 cases, resulting in the commitment of 126 persons. In other words the state prevailed in 75 percent of the hearings held under the reasonable doubt standard. Mental Health Division, Hawaii State Dep't of Health, *A Review of Admissions to Hawaii State Hospital*, report prepared for Third Conference on the Law, Honolulu, Hawaii, May 15-16, 1978, at 4.

Fourth, and finally, the *Texas legislature has statutorily required proof beyond a reasonable doubt* before a mentally retarded person may be involuntarily committed. Art. 5547-300, §37(m)(6). In these closely analogous proceedings the petitioner must prove to a judge or jury that the person subject to commitment is "mentally retarded" and "represents a substantial risk of physical impairment or injury to himself or others, or he is unable to provide for and is not providing for his most basic physical needs." Art. 5547-300, §37(b)(1), (2). The legislature would not have required application of an "unworkable" standard of proof that would "thwart" its interests in committing mentally retarded persons. Because the State's interests in the commitment of mentally retarded persons and mentally ill persons are the same, the State has effectively conceded that proof beyond a reasonable doubt is not an unworkable standard.

Thus, the Texas Supreme Court's reasoning that the "inherent problems of proof" in commitment cases necessitate rejection of the proof beyond a reasonable doubt standard is without any basis in fact or law. In fact, it is contradicted by actual experience in those jurisdictions requiring proof beyond a reasonable doubt, and by the judgment of the Texas legislature in a

closely analogous situation. Even if state interests are relevant to determining the standard of proof, the speculative interests identified by the court below are insufficient to outweigh Appellant's constitutional right to liberty and reputation.

CONCLUSION

The Texas court has equated the risk of an erroneous deprivation of liberty with the risk in an ordinary automobile negligence dispute. But where unconditional liberty and stigma are at stake their deprivation must be justified by proof beyond a reasonable doubt.

For this reason, the judgment of the Texas Supreme Court should be reversed and the case remanded for further proceedings consistent with this Court's order.

Respectfully submitted,

_____

Martha L. Boston

_____

Robert Plotkin
Paul R. Friedman

Counsel for Appellant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

BRIEF FOR THE APPELLEE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

On July 2, 1969, the first of eleven applications for hospitalization was filed against Appellant, ten of which resulted in commitments.[1] (D.S. August 12, 1969, see Ap;

[1]Pursuant to the Revised Rules of the United States Supreme Court Rule 36(2), Appellee is permitted to make reference to parts of the record not contained in the Appendix filed with the Court by Appellant. Appellee makes references to certain docket sheet entries and applications for hospitalization and the supporting certificates of Medical Examinations for Mental Illness throughout the statement of the case. Docket sheet entries with dates of entry and supporting application for hospitalization will hereinafter be referred to in this matter (D.S. with date Ap). Docket sheet entries with dates of entry and supporting certificates of medical examinations will hereinafter be referred to in this matter. (D.S. with date c.m.e.)

April 27, 1970, see Ap; July 7, 1970, see Ap; December 22, 1970, see Ap; November 2, 1971, see Ap; January 30, 1973, see Ap; July 12, 1973, see Ap; March 27, 1975, see Ap; September 25, 1975, see Ap; and February 9, 1976, see Ap). Of the ten commitments, three were for indefinite commitments (D.S. dated November 2, 1971, see Ap; September 25, 1975, see Ap; and February 9, 1976, see Ap). During each of the ten hearings, Appellant was provided with counsel, informed of the nature of each hearing, given an opportunity to cross examine witnesses, given access to a jury trial and on two occasions had jury trials; and was examined each time by two doctors who certified that Appellant was schizophrenic and in need of hospitalization.[2] On several occasions, attempts to provide Appellant with outpatient therapy were tried but resulted in failure because Appellant refused to cooperate by not keeping appointments with the clinic (D.S. July 2, 1969, see c.m.e.; December 22, 1970, see c.m.e.; November 2, 1971, see c.m.e.; and January 30, 1973, see c.m.e.). The medical examinations further revealed that Appellant had difficulty in controlling his hostile feelings and was believed to be potentially dangerous to himself and others (D.S. April 24, 1970 see c.m.e.).

In January of 1976, Appellant had his eleventh, an indefinite commitment petition, filed against him. Appellant retained counsel and a trial to a jury was had (D.S. February 6, 1976, see Ap). At the conclusion of the evidence, the trial judge, over objection from Appellant (Appendix 8-9), instructed the jury that they were to find, if supported by clear, unequivocal and convincing evidence, that Appellant was

[2]Texas Mental Health Code, art. 5547-31 et seq; Art. 5547-40 et seq.

mentally ill and in need of hospitalization for the protection of himself and others (Appendix 12). The jury so found (Appendix 16) and Appellant was committed to the Austin State Hospital for an indefinite period of time (Appendix 17).

Appellant appealed the trial judge's instruction on the burden of proof to the Texas Court of Civil Appeals arguing that the proper burden of proof should be proof beyond a reasonable doubt. The Texas Court of Civil Appeals agreed with Appellant and overruled the trial court's instruction (Appendix 18). Appellee then appealed that decision to the Texas Supreme Court. The Texas Supreme Court in another case, *State v. Turner infra*, concerned with the same issue as here, ruled that the burden of proof for indefinite civil commitment hearings is by preponderance of the evidence (Appendix 21). The Texas Court of Civil Appeals' decision was thereby overruled and the trial court instruction upheld. From this ruling Appellant appeals to the United States Supreme Court (Appendix 24-25).

I.

INTRODUCTION

"Due process is flexible and calls for such procedural protections as the particular situation demands. . .(I)t is a recognition, (however), that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer* 408 U.S. 471, 33 L. Ed. 2d. 484, 494, 92 S. Ct. 2593 (1972). The "particular situation" here is indefinite civil commitment. The principal concern of the State at the commitment hearing is to provide, for an

unwilling individual, treatment and care for his mental disorder. Procedural safeguards most assuredly apply to this situation, but certainly not the same procedural safeguards afforded to one in a criminal prosecution where the primary concern of the State is to seek, for a Defendant, punishment for his criminal activity.

In *In re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527, 548, 87 S. Ct. 1428 91967), the court, dealing with juvenile adjudication hearings, stated that "although the 14th Amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative proceedings, the due process clause does require application during the adjudicatory hearing of the essentials of due process and fair treatment". What the due process clause requires, therefore, in indefinite civil commitment hearings is not conformity "with all the requirements of a criminal trial "i.e., proof beyond a reasonable doubt standard, but essentials of due process and fair treatment.

In *Mathews v. Eldridge,* 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 898 (1976) where a State agency terminated benefits to a social security recipient, the Court set out the steps necessary to determine what process is due in any situation.

> That identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of any erroneous deprivation of such interest through the procedure used, and the probable values, if any, of additional or substitute procedural safeguards; and finally, the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *supra* 47 L. Ed. 2d at 33

Appellee argues that after such an analysis this Court will uphold the Texas Supreme Court's decision that proof by a preponderance of the evidence is the proper standard in indefinite civil commitment hearings in Texas and is not violative of due process.

II.

ARGUMENT

"The Private Interest Affected by Official Action." - Liberty

The result of any indefinite civil commitment hearing, like that of criminal prosecution or juvenile adjudication hearing, may be a loss of liberty. Because of this potential outcome, the Appellant seeks to persuade this court that proof by a preponderance of the evidence denies him due process. The loss of liberty in indefinite civil commitment proceedings is not as severe as the loss in criminal prosecutions because the "mental patient is entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others", *State v. Turner,* 556 S.W. 2d 563, 566. In the criminal prosecution the Defendant, although granted some privileges, e.g. in some cases probation or parole, is "entitled" to nothing if he is convicted.

The most analogous situation to the indefinite civil commitment hearings, where proof beyond a reasonable doubt is not imposed and where the United States Supreme Court has held that due process was not denied, is the revocation of parole or probation. In both instances the attendant consequences of loss of liberty and social

stigmatization are present. The "liberty" in jeopardy in revocation hearings is "conditional liberty properly dependent on observance of special parole [or probation] restriction". Burger Ch. J., in delivering the majority opinion in that case, went on to say "that the liberty of a parolee, although indeterminate, includes many of the core values[3] of unqualified liberty and its termination inflict a 'grievous loss' ", *Morrissey v. Brewer, supra* 33 L. Ed. 2d at 495.

The loss of liberty in indefinite civil commitment hearings is by analogy a "conditional" loss of liberty dependent on the mental progress of the patient. Once the patient is believed to be of such mental capacity that would, or circumstances are such that would, warrant release, he is released[4]. The Texas Mental Health Code has set out the procedure for release of a patient as follows:

Periodic Examination Required

The head of a mental hospital shall cause every patient

[3]"The liberty of a parolee enables him to do a wide range of things open to pesons who have never been convicted of any crime. . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life". *Morrissey v. Brewer, supra,* 33 L. Ed. 2d. at 494, 495.

[4]During the period from September 1, 1974, through August 31, 1975, there were 19,179 admissions to Texas mental hospitals, of which only 5,516 were return placements, meaning that they had been previously discharged by that facility with medical advice within three years of the present admission. During that period there were 21,308 discharges from mental health institutions, and 10,507 or 49.31% of all discharges were persons who had been involuntarily committed. Of all those discharged, 14,541 had been in the institution for a period of ninety days or less. Texas Department of Mental Health and Mental Retardation, Data Book 1975, 15-46.

to be examined as frequently as practicable, but not less than each six months. Mental Health Code Art. 5547-77

Discharge of Patients

a.) The head of a mental hospital may at any time discharge a patient if he determines after examination that the patient no longer requires hospitalization.

b.) The head of a mental hospital may at any time discharge a patient on furlough, and shall discharge a patient who has been on furlough status for a continuous period of eighteen (18) months.

d.) The head of a mental hospital may discharge a resident patient who has been absent without authority for a continuous period of eighteen (18) months.

e.) Upon the discharge of a patient, the head of the mental hospital shall prepare a Certificate of Discharge stating the basis therefore. The Certificate of Discharge shall be filed with the committing court, if any, and a copy thereof delivered or mailed to the patient. Mental Health Code Art. 5547-80 as amended in 1977.

The Court concluded in *Morrissey* that revocation of parole hearings do require due process and enumerated six (6) minimum requirements.[5] With regards to what burden

[5]We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosing to the parolee of evidence against him; (c) opportunity to be heard in person and to

(continued)

must be carried, the Court, stated that "what is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior" *supra* at 496.

Appellant in his brief at page 7 listed a number of liberties at stake in criminal prosecutions and indefinite civil commitment proceedings. Indeed these same liberties are at stake in revocation hearings even though they are conditioned on additional rules which the ordinary citizen does not find mandated to him by a court. Yet the parolee may suffer a "grievous loss" of these same liberties, without the state shouldering a beyond a reasonable doubt standard, but instead just provide "some orderly process."

In *Gagnon v. Scarpelli,* 411 U.S. 778, 36 L. Ed. 2d. 656, 662, 661, 93 S. Ct. 1756, (1973), where the Court held that Petitioner was entitled to a preliminary hearing to determine if there was probable cause to believe Petitioner violated probation, and a final hearing to determine if probation should be revoked, but not entitled to a court appointed counsel in every case, Powell J. delivering the majority opinion, stated that "[p]robation, like parole revocation, is not a stage of a criminal prosecution but does result in a loss of liberty" and that the minimal requirement of due process must be afforded to the probationer. The Court did not

(footnote continued from preceding page)
present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate, this second stage of parole revocation to a criminal prosecution in any sense, *Morrissey v. Brewer supra* 33 L. Ed. 2d at 498, 499.

address itself to the burden of proof[6] in that case. However, it was held that proof beyond a reasonable doubt was not the standard, *Manning v. United States,* 161 F.2d 827 (1947); *United States v. Evers,* 534 F.2d. 1785 (5th Cir. 1976). An indefinite civil commitment hearing also is "not a stage of criminal prosecution but [may] result in a loss of liberty" and therefore should not have proof beyond a reasonable doubt imposed upon it.

Unquestionably, liberty is at stake but the United States Supreme Court has not always imposed the reasonable doubt burden of proof in all proceedings where the potential loss is present. The inference that can be drawn from this difference in requirement for burden of proof is that the United States Supreme Court holds some situations, where the loss of liberty occurs, not as severe as other situations. Since the due process clause does not require proof beyond a reasonable doubt where liberty is at stake, *United States Constitution Fourteenth Amendment;* and since the United States Supreme Court has held that the due process clause only requires a balancing of competing interests to determine what process is due, *In re Winship,* 397 U.S. 358, 91969) and since the Court, itself, has not imposed the reasonable doubt standard in all cases affecting liberty, the State as parens patriae and as protector if its citizenry, alone with guaranteeing minimum due process a set out in the Texas Mental Health Code, are ample justification for the Texas

[6]The burden of proof in a revocation hearing, in Texas is by the preponderance of the evidence. *Scamardo v. State,* 517 S.W. 2d 293 at 298 (1975). For the burden of proof on the federal level see *United States v. Garza,* (5 cir., 1973), 484 F.2d at 89, "All that is required is enough evidence, within a sound judicial discretion, to satisfy the district judge that the conduct of the probationer has not met the conditions of the probation".

Court's decision that the preponderance of the evidence is the proper standard in indefinite civil commitment hearings. This Court, therefore, should reject Appellant's argument that due process requires proof beyond a reasonable doubt in indefinite civil commitment hearings.

"The Governmental Interest" - Parens Patriae and Police Power

Appellant contends that indefinite civil commitment hearings are quasi criminal and that "civil labels and good intentions" are not enough to justify a denial of due process; with the latter Appellee agrees. However, one just has to look at the Texas Mental Health Code and see all the due process safeguards contained therein. Just as "civil labels and good intentions" in and of themselves, cannot justify a denial of due process neither do labels like quasi criminal, loss of liberty, and social stigmatization, in and of themselves, justify a constitutional imposition of proof beyond a reasonable doubt.

The problem in indefinite civil commitment hearings is trying to determine from present circumstances, future needs and future behavior with the aid of medical knowledge which is in a relataively undeveloped state, *Doremus v. Farrell,* 407 F. Supp. 509, 517 (1975); *Lynch v. Baxley,* 386 F. Supp. 378, 392 (1974). And, in addition making this determination within the rigid legal guidelines for an unwilling individual whose mental condition is more insidious than obvious, a condition which does not lend itself to the same certainty of proof as elements of a crime. Yet the individual, as well as society, needs help; and under our present system that is the responsibility of the State.

"Proof beyond a reasonable doubt is an inappropriate standard for use [here]. Predictions of dangerousness can hardly be beyond a reasonable doubt in the undeveloped framework of the science of psychiatric diagnosis and predictions, for the subjective determinations therein involved are incapable of meeting objective certainty" *In re Stephenson* 10 Ill. 507, 367 N. E. 2d 1273, 1277 (1977).[7]

Consequently, as the Texas Supreme Court stated "parens patriae . . . (and) . . . police power are valid, necessary state objectives which should not be thwarted by application of a too strict burden of proof". *State v. Turner supra* at 566. The more stringent requirement of beyond a reasonable doubt would work a hardship on the individual who has a right to treatment and to society which has a right to protection, *In re Beverly* 342 So. 2d 481, 488 (1977). "Mental illness is not a crime, and a person in need of mental treatment is not by reason thereof a criminal. But proof beyond a reasonable doubt is directly related to and associated with criminal trials and procedure, further exemplifying, . . . its inappropriateness here". *In re Stephenson supra* sat 1277.

In *Tippett v. Maryland* 436 F.2d. 1157 (1971), a case dealing with the Maryland Defective Delinquent Act, Petitioner argued that the Act offended due process because it required the state to prove by the preponderance of the evidence that a subject was a defective delinquent. The court in holding that preponderance of the evidence did not violate due process stated:

[7]The holding in *In re Stephenson supra* at 1278 is that the burden of proof for Illinois is clear and convincing. Although Appellee does not concur with that holding, it does concur with the argument against the standard of proof beyond a reasonable doubt in commitment hearings.

> In any event, in the present state of our knowledge choice of the standard of proof should be left to the State. A legislative [or Court] choice of the preponderance standard, the same standard governing civil commitment of mentally ill persons who have no history of criminality ought not to be held in violation of due process requirement when we have no firm foundation for an evaluation of the practical effects of the choice. *supra* at 1159

> The constitution does not require that the procedure under the Act be treated as if they were criminal proceedings subject to the self defeating strictures which the Constitution appropriately throws round the shoulders of Defendants facing criminal charges in adversary legal proceedings. *supra* at 1159.

The state interest is no slight interest to be summarily discarded when it is competing with individual liberty. The state is not seeking punishment but treatment.[8] Treatment with guidelines that more than just provide minimum due process requirements. The burden of proof does not represent the only measure of due process afforded an individual in the indefinite civil commitment hearing. The Texas Mental Health Code has provided much more. A sworn petition for indefinite commitment must be filed, Mental Health Code, Art. 5547-41 as amended 1977. "The

[8] "A high value has also been placed, however, on our society's obligation to protect and care for those of its members unable to protect or care for themselves. It is important to a concerned and humane society that *the margin of error be held to a minimum* in denying such protection and care. Moreover, the individual involved, as well as society, has a strong, interest in getting needed care or treatment which will enable him to function normally, and it seems to us that neither the interests of society nor the mentally ill are well served by a standard requiring proof so conclusive that many persons will be denied needed treatment, care and protection". *Ibid* at 1276, 1277 (emphasis added)

petition shall be accompanied by a Certificate of Medical Examination for Mental Illness by a physician who has examined the proposed patient within the . . . 15 days immediately preceeding the filing of the Petition", Art. 5547-42. (T)he county judge shall set a date for a hearing to be held within . . . 30 days of the filing of the Petition, and shall appoint an attorney ad litem to represent the proposed patient, Art. 5547-43. "At least . . . 7 days prior to the date of the hearing a copy of the Petition and Notice of Hearing shall be personally served on the proposed patient", Art. 5547-44 as amended 1977. "(T)he proposed patient shall not be denied the right to trial by jury. A jury shall determine the issues in the case if no waiver of jury trial is filed, or if jury trial is demanded by the proposed patient or his attorney at any time prior to the termination of the hearing, whether or not a waiver has been filed", Art. 5547-48. Proposed patient is afforded a Hearing on the Petition, Art. 5547-49. "No person shall be indefinitely commited to a mental hospital except upon the basis of competent medical or psychiatric testimony", Art. 5547-50. "The county judge within . . . 2 days after entering his order of Indefinite Commitment, may set aside his order and grant a new trial to the person ordered committed", Art. 5547-53. The Order of Indefinite Commitment is appealable, Art. 5547-54. To encumber parens patriae and police power with the reasonable doubt standard would hinder the process to the extent that the benefits it has to offer needy individuals may very well not be received.

"The Risk of any erroneous deprivation of such interest through the procedure used . . ." - Erroneous Commitment

The Texas Supreme Court's decision in *State v. Turner* *supra* at 566 requiring preponderance of the evidence as the

standard of proof in indefinite civil commitment hearings is not violative of due process of law in light of the decision in *In re Winship*. That case's contribution to the system of juvenile justice was that "factual error" must be minimized and that the burden of proof beyond a reasonable doubt is one way of accomplishing that end. It was the risk of conviction based on "factual error" that concerned the court. Particularly since the set of circumstances for adjudging one a delinquent or a criminal is identical. Past activity which had violated a carefully worded statute. It is the certainty of proving elements of a defined crime and the potential "factual error" which require the highest standard of proof, *Leo v. Twomey* 404 U.S. 477, 30 L. Ed. 2d 618, 626, 92 S. Ct. 619 (1972), not the attendant consequences of loss of liberty and the social stigma. As Harlan, J. stated in his concurring opinion in *In re Winship supra* at 375, "(t)oday's decision simply requires a juvenile court judge to be more confident in his belief that the youth did the act with which he has been charged". The underlying concept being that it is better to allow a guilty man or child to go free than to convict an innocent one because the only interest the state has is to punish for wrongdoing. Consequently, an erroneous conviction harms everyone.

On the other hand, the underlying concept in indefinite commitment proceedings is to provide treatment and care for those whose mental capacities are lacking and preventing them from willingly seeking the care and treatment they need. An erroneous commitment here is much less severe. "It is not unlikely that the mental health of a person erroneously committed will nevertheless be close to a point of serious illness and that such persons might well benefit from the treatment accorded them while committed". *In re Stephenson supra* at 1277. An additional consideration,

mentioned above, is that Texas provides for periodic review of a patient's status to determine if he no longer poses a danger to himself and/or the community.

There exist no mechanisms in the criminal or juvenile case designed to minimize "factual error" prior to a trial on the merits as do exist in the Texas Mental Code.[9] The Texas Mental Health Code seeks to do what the Court in *In re Winship* sought to do, that is, reduce the "factual error", not by relying solely on the burden of proof approach but by establishing a mechanism necessarily used before and after the indefinite civil commitment hearing. Once the indefinite civil commitment hearing becomes necessary the Texas Supreme Court mandated in *Turner* that the state must continue to comport with the "essentials of due process and fair treatment" and produce evidence to satisfy the factfinders of the need for commitment by a preponderance of the evidence.

Proof by a preponderance of the evidence does not increase the occurrence of erroneous commitments. 1. Texas Pattern Jury charges 37 (1969) provided that a jury be instructed that preponderance of the evidence means

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[9]In Texas, a person becomes subject to temporary commitment to a mental hospital upon the application of any adult, supported by statements of two physicians that the person is mentally ill and required observation and/or treatment in a mental hospital. Notice and hearing are required, and a jury is available upon demand. Upon conclusion of the hearing, the person will be ordered confined to a mental hospital for up to ninety days if it is determined that he 1) is mentally ill, and 2) requires observation and/or treatment for his own welfare and protection or the protection of others. The court may refuse to order commitment, otherwise permissible, if he finds that required observation or treatment can be accomplished without commitment to a mental hospital. An order of temporary commitment is appealable to the Court of Civil Appeals. *State v. Turner supra* at 564.

"the greater weight and degree of credible testimony or evidence". The jury[10] is required to make two determinations, first that the testimony is believable and second the weight it must give to the testimony in reaching a decision. Indefinite civil commitment hearings are not conducted in a vacuum. The jury or judge is aware of what the outcomes are when a verdict is reached, the forced commitment to a state mental hospital and the social stigma connected with mental illness. This is no "abstract weighing of the evidence. . . without regard to its effect in convincing. . . (their) mind(s) of the truth of the proposition asserted", *In re Winship* 397 U.S. at 368 quoting *Dorsen & Rezneck, In re Gault* and the Future of Juvenile Law, I Family Law Quarterly, No. 4, at 26, 27 (1967). The Texas decision clearly recognizes the need for making the proper selection of the burden of proof[11] and has determined that an erroneous commitment is

[10]Probably the most valued element of due process is the jury, and Texas provides access to a jury both in temporary hospitalization and in indefinite civil commitment hearings (temporary hospitalization being necessary before the state can process to an indefinite civil commitment hearing). Certainly a jury would offer maximum protection from erroneous commitment.

"Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge." *Sioux City and Pacific R.R. Co. v. Stout*, 84 U.S. (17 Wall,) 657, 21 L. Ed. 745, 749 (1874).

[11]The imposition of proof beyond a reasonable doubt in indefinite civil commitment hearing carries with it the very real danger of creating an

(continued)

minimized just as effectively, if not more so, when the entire indefinite civil procedure is utilized, as it would be by the imposition of just proof beyond a reasonable doubt. The decision carries the added benefit of assuring that treatment and care will not be denied those where the state could not sustain the reasonable doubt standard.

Further, Appellant advances the argument that the conditions of mental hospitals are less than desirable. If such a situation exists, the remedy should properly be left to the legislature and no attempt should be made to remedy the situation by imposing a standard that could prevent those who need help from receiving it. A mental hospital should not be made a "euphemism for a prison" *In re Stephenson supra* at 1279.

(footnote continued from preceding page)

irreparable injury to the criminal system in Texas with regards to the defense of insanity. Texas presently provides two situations in which a defendant in a criminal trial can assert the defense of insanity: Insanity during the commission of the criminal act and insanity at the time of trial. The defendant, having the burden of proof in both cases, must establish his insanity by the preponderance of the evidence. If the burden of proof is raised to a higher standard in indefinite civil commitment hearings, a potential danger exists that the defendant will escape the ends of justice. The defendant is only required to prove his insanity by a preponderance of the evidence, if he succeeds then the state must come forth in an indefinite commitment hearing with proof beyond a reasonable doubt that he is mentally ill and in need of hospitalization. Should the state not be able to meet that burden the defendant will go free.

Texas Code of Criminal Procedure article 46.02 provides that proof by the preponderance of the evidence is necessary to establish insanity at the time of trial. The Code of Criminal procedure article 46.03, dealing with insanity at the commission of the crime, does not set out the burden of proof. But it is settle law in Texas that the burden is by preponderance of the evidence. *Burton v. State*, 471 S.W. 2d. 817 (Tex. Crm. App. 1971).

III.

CONCLUSION

What the Constitution requires is due process of law when the state seeks to infringe on individual rights. In certain situations, e.g., juvenile adjudication proceedings, the United States Supreme Court has required a constitutional imposition of proof beyond a reasonable doubt, *In re Winship,* because of the certainty with which a criminal act can be proven, *Leo v. Twomey.* The Supreme Court has never decided nor has the Constitution ever required this same burden of proof in indefinite civil commitment hearings. This being the case, it becomes the responsibility of the many States through their courts *Woodby v. Immigration Service,* 385 U.S. 276, 17 L. Ed. 2, 362, 87 S. Ct. 483 (1966) and/or legislature to determine what burden of proof is required, *Tippett v. State of Maryland.*

The Texas Supreme Court has held in *State v. Turner* that the burden of proof is by the preponderance of the evidence in indefinite civil commitment hearings. The burden of proof represents the risk of error that society will tolerate in conviction [or commitment situations], *Speiser v. Randall,* 357 U.S. 513 (1958). The proof by a preponderance of the evidence standard represents no greater risk of erroneous commitment in such hearings when that standard is taken as a part of the entire civil commitment proceedings. The Texas Supreme Court, therefore, has not deprived the Appellant of due process because it did not impose proof beyond a reasonable doubt in indefinite civil commitment hearings. To the contrary, the Texas Legislature, has afforded, in addition to the proof standard, additional safeguards designed to

allow the maximum protection of the individual interest, of the state interest and against erroneous confinement.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal from the Supreme Court of Texas

BRIEF FOR THE NATIONAL ASSOCIATION FOR MENTAL HEALTH, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND AMERICAN PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal from the Supreme Court of Texas

BRIEF FOR THE NATIONAL ASSOCIATION FOR MENTAL HEALTH, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND AMERICAN PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE*

INTEREST OF AMICI CURIAE

This brief is filed, pursuant to consents filed with the Clerk, on behalf of the National Association for Mental Health, the American Orthopyschiatric Association, the National Association of Social Workers, and the American Psychological Association as *amici curiae*.

The National Association for Mental Health is a private, nonprofit, voluntary citizens' organization with mem-

bers throughout the country working for the prevention of mental illness, the improvement of attitudes toward and services for the mentally disabled, and the promotion of mental health.

The American Orthopsychiatric Association is a national professional membership organization concerned with the problems of mental disorder and abnormal behavior. An interdisciplinary organization with 5700 members, it brings together in collaborative activity the behavioral, medical and social sciences.

The National Association of Social Workers is a nonprofit national organization of professional social workers which is devoted to the advancement of sound public policy for social work consumers as well as professionals. More than one-third of its 80,000 members are engaged in providing health and mental health services in public, voluntary and private institutional and out-patient settings throughout the country.

The American Psychological Association, a nonprofit professional organization with 47,000 members, is the major association of psychologists in the United States. Its purpose, as set forth in its Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all its branches in the broadest and most liberal manner."

The *amici* include both professional associations and "consumer" organizations, representing the interests both of institutional personnel and of institutionalized persons and their families. Accordingly, they are interested not just in providing adequate care and treatment for the mentally ill or in protecting the rights of individuals sought to be institutionalized, but in both. The *amici* have been involved in a number of important cases concerning the rights of the mentally ill, among them *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975).

STATEMENT OF THE CASE

On February 6, 1976, after a five-day jury trial, the State of Texas committed Frank O'Neal Addington to a mental hospital for an indefinite period. Over Addington's objections, the trial court had instructed the jury to determine, "based on clear, unequivocal and convincing evidence," whether Addington was "mentally ill," and whether he "require[d] hospitalization in a mental hospital for his own welfare and protection or the protection of others."[1] Under Texas law, indefinite commitment is mandatory upon such a finding. Addington appealed his commitment to the Texas Court of Civil Appeals, urging, *inter alia*, that the standard of proof applied in the trial court had denied him due process of law. The Court of Civil Appeals agreed that the trial court had erred in this respect, and remanded the case, holding that the State should be required to prove the factual basis for indefinite commitment beyond a reasonable doubt.

The State thereupon filed a writ of error in the Texas Supreme Court. That Court granted the writ of error and, without hearing oral argument, reversed the Court of Civil Appeals *per curiam* and affirmed the judgment of the trial court on the authority of its then-recent holding in *State* v. *Turner*, 556 S.W. 2d 563 (Tex. 1977) *cert. denied*, 46 U.S.L.W. 3586 (March 20, 1978), J.S.

[1] The court's instructions were limited to a verbatim repetition of the substantive standard for indefinite commitment set out in Section 52(b) of the Texas Mental Health Code, Tex. Rev. Civ. Stat. Ann., art. 5547 (1958 ed. and 1978 Supp.). As defined in the statute, and as explained by the court to the jury, "mentally ill" means "a mental condition which is such as to substantially impair the person's mental health." Jurisdictional Statement (hereinafter J.S.) D-5. See Mental Health Code § 4(k). The statute is silent with respect to the standard of proof. Addington had previously been hospitalized for sixty days for "observation and/or treatment" pursuant to an Order of Temporary Hospitalization, issued pursuant to Section 40 of the Code.

B-1.[2] In *Turner*, as in this case, a trial court instruction to employ a "clear and convincing" standard of proof had been held by the Court of Civil Appeals to be constitutionally insufficient on due process grounds; the Texas Supreme Court reversed that decision, ruling that proof beyond a reasonable doubt was not constitutionally required in civil commitment cases. In affirming the judgment of the trial court, however, it stated that "[i]n future cases of civil commitment the jury should be instructed that the burden is upon the State to prove by a preponderance of the evidence the statutory prerequisites to commitment." 556 S.W.2d at 566, J.S. B-7.[3]

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[2] Addington raised in the Court of Civil Appeals two other objections to the trial court's instructions: that the trial court had refused to instruct the jury that it must find (1) that Addington posed "a real and substantial risk of immediate and serious bodily injury;" and (2) that no less restrictive alternative to hospitalization was available. J.S. D-12. The Court of Civil Appeals did not rule on these alternative grounds for appeal, stating that "until we have an authoritative answer to the question of the quantum of proof required, we do not deem it either advisable or necessary to pass upon them." 546 S.W.2d 105, 106 (Tex. Civ. App. 1977), J.S. A-5. Since the Texas Supreme Court affirmed the judgment of the trial court rather than remanding to the Court of Civil Appeals, it appears to have disposed of Addington's other grounds of objection as well. If, as a matter of Texas law, those issues are still available to appellant, the decision of the Texas Supreme Court is not a "final judgment" within the meaning of 28 U.S.C. § 1257 unless one of the exceptions set forth in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), is applicable. We understand that any question as to this Court's jurisdiction will be dealt with by the parties.

[3] In *Turner*, the Texas Supreme Court said that under Texas law the clear and convincing standard should be employed only to test whether the evidence is factually sufficient to support the verdict. 556 S.W.2d at 565, J.S. B-5. The standard is used as a jury control device, enabling a judge to set aside a verdict that is against the weight of the evidence. *See Meadows* v. *Green*, 524 S.W.2d 509, 510 (Tex. 1975). The standard of clear and convincing proof is not used in Texas when instructing the finder of fact how to decide close questions. With the possible exception of certain equitable actions, *see Sanders* v. *Harder*, 148 Tex. 593, 227 S.W.2d 206, 210 (1950) (dictum), quoted in *Turner*, 556 S.W.2d at 565-66, J.S. B-5, Texas law directs application of a preponderance of the evidence standard in all civil actions.

It is plain that in affirming the trial court's judgment in this case, the Texas Supreme Court held, as it did in *Turner*, that the trial court had erred in instructing the jury to apply the clear and convincing standard of proof, rather than the preponderance test, but that the error was harmless, since Addington had been found to meet the statutory standards for commitment under "a stricter standard than is required." J.S. A-2, B-7. The issue presented on Addington's appeal is whether the Texas Supreme Court properly held that the reasonable doubt standard was not constitutionally required in his case.

We do not believe it follows, however, that a decision by this Court that beyond a reasonable doubt is not constitutionally required mandates affirmance of the judgment below. If this Court should rule that due process requires a stricter standard than preponderance of the evidence, it remains for the Texas Supreme Court to decide what alternative standard of proof would be appropriate as a matter of State law. The Texas Supreme Court could either adhere to its present unwillingness to recognize a clear and convincing standard of proof in civil suits, *see* note 3 *supra*, and adopt the reasonable doubt standard, or it could give controlling weight to its concern that a reasonable doubt standard would be inappropriate in civil commitment cases and adopt an intermediate standard. Accordingly, only if this Court agrees with the Texas Supreme Court that the preponderance standard is constitutionally permissible should it affirm the judgment below. Any other decision—regardless of the position that the Court takes on the reasonable doubt standard—should result in a remand to that court for whatever reconsideration it deems appropriate. As

the remainder of this brief will demonstrate, *amici* are particularly concerned that the Court not in any way endorse the preponderance standard in civil commitment proceedings.

SUMMARY OF ARGUMENT

The standard of preponderance of the evidence is wholly inadequate to protect the rights of individuals sought to be confined against their will by the state, for any reason whatsoever. Where an individual stands to be deprived of unconditional liberty, the standard of proof must be one which guarantees the highest degree of accuracy in the decision to commit. With the striking exception of the court below, every state and federal court which has considered the appropriate standard of proof for extended civil commitment of the mentally ill has rejected the preponderance standard.

Where an individual is sought to be committed on grounds that he or she may harm other people, or otherwise engage in criminal activities, the fact-finder must be instructed to exercise the greatest caution before voting to commit. Three of the *amici*—the National Association for Mental Health, the American Orthopsychiatric Association, and the National Association of Social Workers—believe that an individual may not be stigmatized as dangerous to the community and confined indefinitely by the state unless the facts justifying such confinement and stigmatization are proved beyond a reasonable doubt. *Amicus* American Psychological Association agrees to the extent that a standard of proof substantially higher than preponderance of the evidence is necessary, but takes no position with respect to the specific requirement of proof beyond a reasonable doubt as opposed to proof by clear and convincing evidence.

Amici find no merit in any of the grounds offered by the court below as justification for requiring that the

preponderance standard be used in all civil commitment proceedings. In particular, *amici* do not believe that the peculiar problems of proof in some civil commitment cases justify resort to a substantially lower standard of proof in light of the interests at stake—an individual's liberty and good name. In any event, difficulties of proof may to a considerable extent be alleviated by a more precise formulation of the substantive standard for commitment—as indeed they could have been in this case. And in those States which have adopted a high standard of proof there is no evidence that judges and juries are unwilling or unable to reach an affirmative commitment decision.

We have reviewed the laws governing involuntary hospitalization of the mentally ill in the fifty States (see Appendix hereto), and found that nearly three-quarters now require, either explicitly or by judicial interpretation, a high standard of proof in civil commitment proceedings. The civil commitment laws of most of the remaining States do not specify a standard of proof, and their courts appear not to have had occasion to consider the issue. The court below stands along among courts in recent years in its conclusion that the preponderance standard provides adequate protection for an individual's rights where indefinite confinement is at issue.

ARGUMENT

I. Where the State Seeks to Confine an Individual and Where the Substantive Standard Applied Subjects that Individual to the Risk of Stigmatization as Dangerous to Others, Due Process Requires the Highest Degree of Certitude in the Fact-Finding and Decision-Making Process.

The function of the standard of proof in any lawsuit is to "instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). More simply, it "tell[s] the factfinder how to decide close cases, and when to regard a case as close." Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299 (1977). The law proportions the standard of proof to the gravity of the consequence of an erroneous judgment. In an ordinary civil proceeding, the standard of preponderance of the evidence reflects an assessment that "a mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant." C. McCormick, Evidence § 341, at 798 (2d ed. 1972). In a criminal case, the "interests of immense importance" which an individual has at stake make constitutionally "indispensible" the standard of proof beyond a reasonable doubt. *In re Winship*, *supra*, 397 U.S. at 363-64. The consequences for an individual who stands to be labeled by the state as "dangerous to others" and to be indefinitely confined [4] in a mental institution are at

[4] By "indefinite confinement" we mean not just confinement which has no fixed term, but any confinement other than temporary or short-term confinement. This may also be referred to as "extended confinement." The question of whether an individual may be temporarily confined on a lower standard of proof is not at issue in this case. *Cf. Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972).

least as grave as those attendant upon conviction of a crime.

A. *The Standard of Preponderance of the Evidence Does Not Comport with Constitutional Requirements of Due Process and Fair Treatment in Any Case Where an Individual's Unconditional Freedom Is at Stake.*

This court has recognized that "involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor* v. *Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring). *See also Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972) (civil commitment entails a "massive curtailment of liberty"). The interest of "transcending value" which an individual has in liberty, *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), requires that the fact-finder in a civil commitment proceeding be asked to do something more than "merely . . . perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum . . . ." *In re Winship*, *supra*, 397 U.S. at 368. The standard of proof must be one which "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts at issue." *Id.* at 364. And, as we discuss in Part II below, not a single other state or federal court which has considered the issue has found the preponderance standard to satisfy due process requirements where an individual's unconditional freedom is put at risk in a proceeding for extended civil commitment.[5]

[5] This case does not present the issue of what standard of proof may be acceptable in a civil proceeding to confine an individual who has already been judged guilty of a crime, or whose liberty is otherwise not unconditional. Compare *Tippett* v. *Maryland*, 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed as improvidently granted sub nom. Murel* v. *Baltimore City Criminal Court*, 407 U.S. 355

After *Winship* and *O'Connor* v. *Donaldson*, *supra*, the state cannot seriously contend that the incarcerated individual's loss is mitigated by the fact that one of the purposes of the incarceration is treatment for mental illness. Indeed, one court of appeals has dismissed such an assertion as "archaic," stating that "[i]t is well settled that realities rather than benign motives or noncriminal labels determine the relevance of constitutional policies." *United States ex rel. Stachulak* v. *Coughlin*, 520 F.2d 931, 936 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976). *See also O'Connor* v. *Donaldson*, 422 U.S. at 589 (Burger, C.J., concurring) (the state may not "lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concepts of due process would not tolerate such a 'trade-off.' "). Indeed, one might well say that the loss of liberty which has resulted in this case is measurably greater than that involved in a criminal or juvenile proceeding, since Addington has been committed for an indeterminate period, and will be unable to regain his freedom until he can prove that he is no longer "dangerous to himself or others." *State* v. *Turner*,

(1972) (preponderance of the evidence meets constitutional standards for civil commitment under Maryland Defective Delinquent Law, where individuals involved had been convicted of various state crimes and sentenced to fixed terms of imprisonment); *State* v. *Krol*, 68 N.J. 236, 344 A.2d 289 (1975) (preponderance standard for persons acquitted by reason of insanity); and *Lausche* v. *Commissioner of Public Welfare*, 302 Minn. 65, 225 N.W.2d 366 (1974), *cert. denied*, 420 U.S. 993 (1975) ("Although [beyond a reasonable doubt] is a necessary standard to be employed with regard to the initial commitment, we cannot extend it to supplementary proceedings, including the petitions for discharge."); with *People* v. *Burnick*, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975) (reasonable doubt standard constitutionally required for commitment of convicted criminal as "mentally disordered sex offender"); *In re Andrews*, 368 Mass. 468, 334 N.E.2d 15 (Mass. 1975) (same, for commitment as "sexually dangerous person"). *Cf. Baxstrom* v. *Herald*, 383 U.S. 107 (1966).

supra, 556 S.W.2d at 566, J.S. B-6. See sections 80 through 86 of the Texas Mental Health Code.

B. *Where an Individual Is Sought to be Confined on Grounds That He or She Constitutes a Danger to Others, Due Process Requires the Safeguard of Proof Beyond a Reasonable Doubt.*

1. *Where the proceedings put at risk both the good name and the freedom of an individual, the highest standard of proof is required.*

We have argued in the preceding section that the preponderance standard is never constitutionally acceptable where the state seeks to deprive an individual of unconditional liberty. Here we argue that "if the proceedings seriously put at risk both the personal liberty and the good name of the individual, the safeguard of proof beyond a reasonable doubt is required." *People* v. *Thomas*, 19 Cal. 3d 630, 638, 139 Cal. Rptr. 594, 598, 566 P.2d 228, 232 (1977). *See also In re Winship*, *supra*, 397 U.S. at 363-64.[6]

In *Winship* this Court held that proof beyond a reasonable doubt was required in criminal cases, not only because of the individual's potential loss of physical liberty, but also because of "the certainty that he would be stigmatized by the conviction." 397 U.S. at 363. It is not clear to us to what extent the stigma averted to in *Winship* inheres in the fact of incarceration itself, and to what extent it derives from the particular deeds an individual is found to have done. Nor is it entirely clear whether the stigma of being labeled a "delinquent" was

[6] *Amicus* American Psychological Association supports the arguments in this Part to the extent that they stand for the proposition that due process requires substantially more than the preponderance of evidence standard, but takes no position with respect to the specific requirement of proof beyond a reasonable doubt as opposed to clear and convincing evidence.

essential to the Court's extension of the reasonable doubt standard to juvenile proceedings. Assuming, however, that the risk of incarceration must be coupled with a risk of stigmatization in order to evoke the highest standard of proof, we think it plain that the stigma involved where an individual is branded as so dangerous to the community as to require his being locked up indefinitely is at least as great as, and probably substantially greater than, the stigma involved in being convicted of a crime like simple assault.[7]

In this case, the Court need not reach the issue of whether the stigma which may attach where nondangerous mentally ill individuals[8] are sought to be confined because they are not "capable of surviving safely in freedom," *O'Connor* v. *Donaldson*, *supra*, 422 at 576,

[7] *Cf. United States ex rel. Stachulak* v. *Coughlin*, *supra*, 520 F.2d at 936 ("an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency"). *Accord, In re Andrews*, 368 Mass. 468, 488, 334 N.E.2d 15, 26 (1975). A few courts appear to have recognized that the risk of stigma alone may call for a higher standard of proof than the preponderance of the evidence. *See, e.g., Ziegler* v. *Hustisford Farmers' Mutual Insurance Co.*, 238 Wis. 238, 298 N.W. 610 (1941) (suit on fire policy, defense of arson by insured; burden on defendant by "clear and satisfactory" evidence); *In re Farris*, 229 Ore. 209, 367 P.2d 387 (1961) ("clear and convincing" standard in disbarment proceedings); *Ashley* v. *Ashley*, 118 Ohio App. 155, 193 N.E.2d 535 (1962) (clear and convincing evidence required to overcome presumption of legitimacy of a child born in wedlock); *Stephenson* v. *Stephenson*, 221 A.2d 917 (D.C. App. 1966) (adultery as grounds for divorce must be established by clear and convincing evidence).

[8] Recent evidence suggests an unfortunate and continuing public attitude toward mental illness which may subject an individual who has suffered from mental illness to hostility, fear, and scorn. *See* Appellant's Brief, Part II(B). In addition, studies have shown that the stigma attached to mental illness escalates with the degree of intervention by the state, so that individuals who have been compelled to spend any time in a mental institution for whatever reason suffer continuing adverse consequences after release. Bord, *Rejection of the Mentally Ill: Continuities and Further Developments*, 18 Soc. Prob. 469 (1971).

is sufficient to trigger the reasonable doubt standard.[9] As we will show, the stigma which attached to commitment in this case was sufficient to require the protection of the highest standard of proof.

2. *The substantive standard under which Addington was committed permitted an inference that he constituted a danger to others.*

Under the substantive standard for indefinite civil commitment set forth in Section 52(b) of the Texas Mental Health Code, the jury must find that an individual is "mentally ill," and "require[s] hospitalization for his own welfare and protection *or* the protection of others." (Emphasis added.) The trial court's instructions to the jury in this case did not require a finding that Addington was to be committed on one or the other, or even both, of the latter two grounds. Indeed, in his instructions the judge simply repeated the words of the statute, refusing Addington's request that they be amplified.[10] It is, then, open for us, as indeed it is for anyone, to conclude that Frank Addington was committed because a jury found

[9] Although the Texas Supreme Court stands alone among courts in recent years in concluding that the preponderance standard can ever be constitutionally acceptable where the state seeks to confine an individual indefinitely, *see* Part II *infra*, some courts and legislatures have concluded that there may be considerations weighing against the application of a reasonable doubt standard in the "safe survival" situation which are not present where an individual is charged with being dangerous to others. While rejecting the preponderance standard, they have held applicable in these situations what they regard as a somewhat less rigorous standard of proof. *See, e.g., In re Estate of Roulet*, 20 Cal. 3d 653, 143 Cal. Rptr. 893, 574 P.2d 1245, 1249 (1978) ("clear and convincing proof" sufficient to protect a "gravely disabled" person's rights without unduly "criminalizing" the proceedings), discussed further in notes 16 and 30, *infra*.

[10] Several of the instructions requested by Addington would appear to have offered the trial court an opportunity to clarify the substantive grounds on which the jury was being asked to commit. *See* J.S. D-1 through D-3, and notes 21-22 *infra*.

him to be so potentially dangerous to other people that he must be locked up.[11]

That the jury in fact reached this conclusion is strongly suggested by the record of the trial, during which "the jury heard for five days witnesses testify to assaults, threats, and serious destruction of property by Frank Addington." (State's Application for Writ of Error in the Texas Supreme Court, J.S. D-20.) These incidents were described to the jury by the attorney who presented the case for the State[12] as involving "violent behavior, deadly behavior, and in a continued course." (Tr. 1024.) The expert and other testimony adduced by the State at trial was almost entirely devoted to an attempt to show that Addington was imminently dangerous to the community; and it was suggested again and again that Addington, if not confined, would be likely to engage in criminal behavior.[13] In his summation to

[11] Some state civil commitment statutes set forth in one provision that mentally ill individuals may be confined if they are dangerous to themselves or to others, although the precise wording varies widely. *See* Appendix *infra*. These statutes thus combine in a single provision the two generally accepted justifications for commitment: "to ensure [an individual's] own survival or safety," and "to prevent injury to the public." *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 573-74. These alternative grounds for commitment tend to be more clearly disjunctive in recent statutory enactments. One State —California—has separate requirements for commitment proceedings in these two situations. *See* note 30, *infra*. We do not know how common is the practice found in this case of instructing the jury on both grounds without requiring agreement on either or both.

[12] The case for the State of Texas was presented by an Assistant Criminal District Attorney from Galveston County, the significance of which fact that individual himself felt compelled to comment upon during his voir dire of the jury. (Tr. 5.)

[13] The jury was made aware of the fact that Addington had in fact been charged several times with criminal acts, and the charges dropped in favor of temporary hospitalization. The State's attorney characterized the incidents which immediately preceded the institution of indefinite commitment proceedings as criminal, and specu-

the jury, the State's attorney asked them to consider whether they would "be afraid of him if he's released today and goes free about our streets." (Tr. 1054.)

The stigma of being labeled a prospective danger to the community is at least as great as the stigma of being labeled a past offender. The inchoate charge leaves room for endless speculation on what manner of antisocial acts may be anticipated from such an individual. By its very nature, this speculation is almost impossible to counteract even after one is no longer confined. To the extent that the substantive standard under which Addington was committed permits the inference that the jury found that his incarceration was necessary to protect other people from harm, a stigma of incalculable proportions has been imposed upon him. Under these circumstances, he was at least entitled to have the jury instructed to exercise the greatest caution before voting to commit.

C. *There Is No Countervailing State Interest in Applying a Lower Standard of Proof in this Case Which Outweighs the Individual's Transcendent Interest in Remaining at Liberty and Avoiding Stigmatization as Dangerous to Others.*

1. *Requiring the highest degree of certainty by the factfinder does not interfere with procedures which may be distinctive to the civil commitment process, or "criminalize" that process.*

As in *Winship*, there is no merit in an argument that to afford persons such as Addington the protection of proof beyond a reasonable doubt "would risk destruction of beneficial aspects of the [commitment] process." 397 U.S. at 366. In this case, the use of a higher standard would have had absolutely no effect on "the informality,

lated at length at several points during the trial on the consequences of Addington's being able to raise an insanity defense in future criminal prosecutions. *See* Tr. 571-77, 588-89, 1056-57.

flexibility, or speed of the hearing at which the factfinding [took] place." *Id.* Nor would it have had any effect on the procedures employed prior to the hearing on indefinite commitment. While as one court has noted, it "may result occasionally in an expanded hearing where the government chooses to muster additional evidence, '[t]he constitutional guarantee demands no less if the search for truth is not [to] be sacrificed to administrative speed and convenience.'" *In re Ballay*, 482 F.2d 648, 663 (D.C. Cir. 1973).

Nor would requiring the highest standard of proof have "criminalized" the commitment process in this case. Assuming that the concern here is for the impact which "criminalization" would have on the sensibilities of the individual proposed to be committed, where incarceration is sought even in part on grounds that one constitutes a danger to society, this nice concern is misplaced. In Addington's case, a concern for "criminalization" is particularly ironic: carrying the case for the State during a five-day trial was an Assistant Criminal District Attorney, whose summation to the jury suggests as great an interest in preventing criminal acts as in providing care and treatment. (Tr. 1050-1065.) In such a case, there is always the danger that civil commitment will be perceived as an alternative to criminal prosecution, with the state's task made simpler by the absence of many of those safeguards which are familiar incidents of criminal proceedings.[14]

[14] *Cf.* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 Harv. L. Rev. 356, 383-84, n. 140 (1975) (suggesting that use of a standard of proof less stringent than beyond a reasonable doubt in civil commitments for "dangerous" individuals "will always leave the suspicion that the government is punishing defendants for conduct which it could not prove with sufficient force to invoke the criminal sanction as an original matter."). A lower standard of proof encourages the state to resort to the civil commitment process for dealing with persons who ought to be channeled through the criminal justice system and who may be entirely unreceptive to the treatment mandated by statute, *e.g.*, Texas Mental Health Code § 70, greatly overextending mental health care facilities and systems.

2. *The peculiar problems of proof in civil commitment cases do not justify the application of a lesser standard, but rather suggest the need for utmost care in reaching the commitment decision.*

The Texas Supreme Court in the *Turner* case gave as its principal reason for adopting the preponderance standard in civil commitment cases its concern that "the State's ability to act as *parens patriae* for the mentally ill would [otherwise] be impaired." Quoting from the decisions of the highest courts of two sister states,[15] it held that the preponderance standard was the only one that would enable a jury to make a "determination of *future* conduct and *future* need . . . ." 556 S.W.2d at 566. (Emphasis in original.)

It is true that a number of courts have held back from requiring the reasonable doubt standard in civil commitment proceedings even while rejecting the preponderance standard, because "the questions involved are the primarily subjective ones of the subject's mental condition and the likelihood that he will be dangerous in the future. Such subjective determinations cannot ordinarily be made with the same degree of certainty that might be achieved where purely objective facts and occurrences are at issue." *Lynch* v. *Baxley*, 386 F. Supp. 378, 393 (M.D. Ala. 1974). *See also In re Stephenson*, 67 Ill. 2d 544, 367 N.E.2d 1273, 1277 (1977) ("[p]redictions of

[15] The Texas Supreme Court did not remark on the fact that in neither of the two cases it relied upon did the State court accept the preponderance standard for civil commitment. Indeed, in both *State ex rel. Hawks* v. *Lazaro*, 202 S.E.2d 109 (W. Va. 1974), and *In re Beverly*, 342 So. 2d 481 (Fla. 1977), the preponderance standard was specifically rejected in favor of a standard requiring, respectively, "proof that is clear, cogent, and convincing," 202 S.E.2d at 127, and "clear and convincing evidence." 342 So. 2d at 488.

dangerousness can hardly be beyond a reasonable doubt in the undeveloped framework of the science of psychiatric diagnosis and prediction, for the subjective determinations therein involved are incapable of meeting objective certainty"). *See also* Part II *infra*. Since the reasoning of these cases can be, and in this case has been, used to support the preponderance standard, we think it important to point out its shortcomings, without suggesting that we necessarily disagree with the courts' particular articulation of the standard of proof on the facts of those cases.[16]

Two fallacies underlie the reasoning of the courts which have declined to apply the highest standard of proof in civil commitment proceedings because of perceived problems of proof. First, the problems of proof in a civil commitment proceeding derive more from confusion about the substantive standards for commitment than from any peculiar difficulties of proving the facts justifying commitment of a mentally ill individual. The reasoning of the New Hampshire Supreme Court, rejecting an argument by the State that the reasonable doubt standard was "unworkable" in the civil commitment context, is instructive:

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[16] It may well be that the reasonable doubt standard is inappropriate for some types of civil commitments, and that in some cases the "clear and convincing" formulation favored by a number of courts may be more consonant with the nature of the procedure, or the severity of the deprivation. *See, e.g., In re Estate of Roulet, supra*, 20 Cal. 3d 653, 143 Cal. Rptr. 893, 574 P.2d 1245 (proceeding to appoint the State as conservator for "gravely disabled" individual; conservatorship terminates automatically after one year and the conservatee has the right upon request to release from an institution in which she or he may have been confined). But the case now before this Court does not present an occasion for considering these possibilities, since, as we have shown, the stigma attached to the outcome of the proceeding here was by its nature a quasi-criminal one, and since Addington's incarceration was potentially life-long.

> "While it is undoubtedly true that some persons who might be committed under a lesser standard will 'go free' under a reasonable doubt standard, the state's fear that disturbed persons can *never* be committed is not persuasive. We note that it is not dangerous [*sic*] in any absolute sense of which the trier of fact must be convinced, but rather 'a potentially serious likelihood' of dangerousness. It is not difficult to conceive of circumstances in which evidence of past conduct and mental disability will convince 'beyond a reasonable doubt' of a potentially serious likelihood of dangerousness. 'Proof of mental state . . . is a commonplace in the law, and despite the difficulty of establishing many controverted facts in a criminal trial, we steadfastly adhere to the reasonable-doubt burden of proof.' " *Proctor* v. *Butler*, 380 A.2d 673, 677 (N.H. 1977), quoting from *United States ex rel. Stachulak* v. *Coughlin*, 520 F.2d 931, 936 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (emphasis in original).

We too are not persuaded that the difficulties which inhere in proof of the commitment criteria are substantially different from those which may be presented by proof of mental state in the criminal context, particularly where an individual is alleged to be dangerous to others. Nor are we persuaded by the assertion of some courts, and indeed by some members of the medical profession, that it is "impossible" to reach a conclusion on the criterion of "dangerousness" beyond a reasonable doubt. If one accepts the dictionary definition of "dangerous," for example, "able or likely to inflict injury,"[17] a finding that individuals are "dangerous" does not require a prediction that they are *going* to cause harm to others, but at most a judgment, based on past actions and present

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[17] Webster's Third New International Dictionary (1975).

mental state, that they are likely to do so.[18] The fact-finder in such a case, whether judge or jury, is almost certain to be confronted with concrete evidence of past and present conduct from which, with the assistance of expert testimony and clinical diagnosis, may be inferred the likelihood of an individual's causing harm to someone else.[19] It is entirely unnecessary that what in Texas is an important jury function be reduced to mere "prediction" or "speculation."[20]

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[18] *See* Note, *The Supreme Court 1969 Term*, 84 Harv. L. Rev. 1, 164 (1970) ("It would not be anomalous for a fact-finder to believe without any doubt that a person was 'dangerous' while still in doubt whether he would commit any specific harm if released.")

[19] *See Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, 274 (1940) (statutory standard for commitment as "sexual psychopath" calls for proof of "habitual course of misconduct in sexual affairs" such that individuals are "likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled desire;" these conditions, "calling for evidence of past conduct pointing to probable consequences, are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime.") A number of states require proof of some recent "overt act" warranting confinement. *See, e.g.*, Ala. Code tit. 22, § 52-10 (1975 ed. & 1977 Supp.); Mass. Ann. Laws Ch. 123, § 8 (1972 ed. & 1978 Supp.); Neb. Rev. Stat. § 83-1009 (1977 Supp.); Ohio Rev. Code Ann. § 5122.01 (1970 ed. & 1976 Supp.); Pa. Cons. Stat. Ann. tit. 50, § 7301 (1969 ed. & 1978 Supp.).

[20] This Court has recognized that "most, if not all" States condition civil commitment "not solely on the medical judgment that the individual is mentally ill and treatable, but also *on the social and legal judgment* that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty. In making this determination, the jury serves the critical function of introducing into the process *a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.*" *Humphrey* v. *Cady*, *supra*, 405 U.S. at 509 (emphasis added). Some commentators have argued for limiting the role of experts in civil commitment proceedings, on grounds that the exaggerated importance given their often differing opinions deprives the jury of its fact-finding function. *See, e.g.*, Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Calif. L. Rev. 693 (1974). In too many

There would have been ample opportunity in a situation such as this one for clarifying instructions to the jury on the degree of acceptable risk in light of the probable magnitude of harm and the likelihood of its occurrence, which would give due weight to the interests of both the state and the individual.[21] In addition, the avail-

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cases where mental illness is involved, the concept of "dangerousness" has been permitted to reflect "clinical definitions and conclusions rather than the appropriate judicial exegetics and community values." *In re Ballay*, *supra*, 482 F.2d at 665.

[21] The trial court refused Addington's request that the statutory standard be construed to require hospitalization only if "necessary to protect him from immediate and serious bodily harm," and if "he will cause immediate serious bodily injury to someone other than himself." J.S. D-2.

This Court has never directly spoken to the constitutional sufficiency of the standards embodied in commitment statutes such as the one involved here, *cf. Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940), and the issue is not now before the Court. We note, however, that the substantive standards for commitment in the Texas Mental Health Code have not received an authoritative construction from the highest court of that state. *See* note 2, *supra*. In *Reynolds* v. *Sheldon*, 404 F. Supp. 1004 (N.D. Tex. 1975) (three-judge court), the phrase "for his own welfare and protection and the protection of others" in the Texas Mental Health Code was sustained against a challenge that it was unconstitutionally vague. Acknowledging that the "welfare and protection" standard was "slightly ambiguous," the court construed it to be "[n]ot in itself broader than the Supreme Court's due process standard in *O'Connor* v. *Donaldson*." 404 F. Supp. at 1009. The court stated that the "proper interpretation of 'protection' is 'protection from danger,' which makes the terms 'protection' and 'dangerous' co-extensive." *Id.* The *Reynolds* court did not comment on the statute's failure to differentiate between persons whose mental illness makes them "dangerous" to themselves and those who may be "dangerous" to other people; it did say, however, that the statutory standard does not "condone involuntary confinement of an individual merely for care and assistance where there is no danger of physical nor serious non-physical consequences to the individual if he were not confined." *Id.* The *Reynolds* court's construction of the statutory standard for commitment was relied upon by the Texas Court of Civil Appeals in rejecting a vagueness challenge to the same statute, *Powers* v. *State*, 543 S.W.2d 194, 195 (Tex. Civ. App. 1976). In *Powers*, the court

ability of alternatives to hospitalization under a state's mental health program may helpfully illuminate the criteria warranting such a drastic measure, and narrow the substantive grounds for confinement which the jury is asked to consider.[22] Certainly it should not be "impossible" for the state to meet *some* substantive standard "beyond a reasonable doubt."

The second fallacy underlying the reasoning of those courts which have rejected the reasonable doubt standard is their assumption that the solution to the problem of statutory vagueness is in lowering the standard of proof. Applying a lower standard of proof will not make the standard any more precise or reduce the number of errors in decision-making, but merely increases the likelihood that the jury will find what the state asks it to find. The risk of error is thus shifted in a direction against the individual's interest in freedom and in favor of the state's interest in confinement. But here, as in the criminal field, the risk of error resulting from the application of the substantive standard should be borne predominantly by the state, not by individuals who are brought within its ambit.[23]

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noted that the phraseology of the Texas statute was "very similar to and substantially the same" as the Wisconsin statute construed by this Court in *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972).

[22] The trial court refused Addington's request that the jury be instructed to find that "commitment to a mental hospital is the *only available means* by which his own welfare and protection and the protection of others may be achieved." J.S. D-1 (emphasis supplied). *Cf. Robinson* v. *California*, 370 U.S. 660, 665 (1962).

[23] Similarly, a high standard of proof will not cure defects in a substantive standard. In *In re Ballay*, *supra*, 482 F.2d at 667, the court of appeals suggested that "[w]hile a more rigorous standard of proof may not allay infirmities in substantive statutory elements it certainly may, and the reasonable doubt standard is designed particularly to, partially offset them *by reducing the risk of factual error.*" (Emphasis added). *See also* Combs, *Burden of Proof and Vagueness in Civil Commitment Proceedings*, 2 Am. J. Crim. L. 47, 62 (1973). As one commentator has remarked with respect to the *Ballay* court's reasoning, "[t]here appears to be no relationship between the problem and the suggested solution. . . . [I]t seems that the proper response to vague commitment standards is not to demand a high standard of proof but to declare the statute unconstitutional." *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1297, n. 190 (1974) (hereinafter cited as *Developments—Civil Commitment*). The objective of the *Ballay* court, which is reflected in other parts of its opinion, was not so much to reduce the number of errors in decision-making as to weight the risk of error against the state and in favor of the individual in the civil commitment context. *See also* Note, 42 U. Cinn. L. Rev. 751, 758 (1973) ("The casualty of an application of the [reasonable doubt] standard need not be the workability of the commitment system, but the vague terminology. Strict requirement of proof beyond a reasonable doubt may help to winnow the meaningless from the classifications and forge a new and more accurate statutory language.")

In sum, problems of proof do not justify a lower standard of proof in civil commitment proceedings.[24] As the New Hampshire Supreme Court has put it:

> "The certitude required as a matter of due process reflects the severity of the deprivation imposed—not the difficulties which may inhere in the proof of the commitment criteria imposed by the legislature. 'The law, in short, does not weaken the standard of proof merely because the evidence is weak.'" *Proctor* v. *Butler*, *supra*, 380 A.2d at 677, quoting from *People* v. *Burnick*, *supra*, 14 Cal. 3d at 330, 121 Cal. Rptr. at 504, 535 P.2d at 368.

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[24] Scholarly opinion appears to reject unanimously the preponderance standard of proof for civil commitment proceedings. Many writers support the reasonable doubt standard: *Developments—Civil Commitment*, *supra*, 87 Harv. L. Rev. at 1295-1303; Note, 42 U. Cinn. L. Rev. 751, 758-59 (1973); Note, *The Supreme Court 1969 Term*, 84 Harv. L. Rev. 1, 163-65 (1970); Note, *Civil Commitment of Narcotics Addicts*, 76 Yale L.J. 1160, 1180-83 (1967). Others favor what they regard as an intermediate standard of proof: Note, *Involuntary Civil Commitment—How Heavy the Burden?*, 29 Baylor L. Rev. 187 (1977); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 Harv. L. Rev. 1288 (1966); Note, *Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudications*, 42 Fordham L. Rev. 611 (1974).

II. A Survey of State Laws Governing Civil Commitment of the Mentally Ill Shows That the Preponderance of the Evidence Standard Is an Anomaly Where Extended Confinement Is Sought.

We have surveyed the State laws governing general civil commitment of the mentally ill [25] to determine what standards of proof are now common. The results of that survey are presented in tabular form in the Appendix to this brief. The laws relating to commitment of the mentally ill have undergone substantial revision in many States in recent years. While these laws are not uniform in the wording of their substantive requirements, or in their procedural requirements for such matters as jury trials, post-commitment judicial review, and release, it is striking that nearly three-quarters—either expressly or as judicially construed—require the fact-finder to reach a high degree of certitude before making the decision to commit.

Seven States have adopted the reasonable doubt standard by statute.[26] In five States and the District of Columbia, the courts have construed the commitment statutes to require proof beyond a reasonable doubt.[27] Nineteen

[25] By "general civil commitment" laws we mean those that provide for the indefinite or extended confinement of individuals found to be mentally ill, and, in some sense, dangerous to themselves or others. They are to be distinguished from specialized commitment provisions adopted by some states to deal with senile or mentally retarded persons in need of custodial care who are not within the definition of "mentally ill," or with persons classified as "sexually dangerous" or "defective delinquents." Commitment of persons in the latter categories is generally sought subsequent to their conviction of a crime. *See* note 5, *supra*.

[26] Hawaii, Idaho, Kansas, Oklahoma, Oregon, Utah, and Wisconsin. *See* Appendix *infra*.

[27] *In re Hodges*, 325 A.2d 605 (D.C. 1974); *In re Bullay*, 482 F.2d 648 (D.C. Cir. 1973); *Denton* v. *Commonwealth*, 383 S.W.2d 681 (Ky. 1964); *Superintendent of Worcester State Hospital* v. *Hagberg*, —— Mass. ——, 372 N.E.2d 242 (1978); *Lausche* v.

States have adopted a "clear and convincing proof" standard by statute,[28] and in another four States the courts have construed the commitment statute to require proof that is clear and convincing.[29] In California, clear and convincing proof is required in "grave disability" proceedings, and proof beyond a reasonable doubt appears to be required where an individual is alleged to be "imminently dangerous" to others.[30] Montana's recently en-

Commissioner of Public Welfare, 302 Minn. 65, 225 N.W.2d 366 (1974), *cert. denied*, 420 U.S. 993 (1975); *Proctor* v. *Butler*, 380 A.2d 673 (N.H. 1977). In New Jersey, the lower courts have held that the reasonable doubt standard applies to civil commitment of the mentally ill, *see, e.g., In re J.W.*, 44 N.J. Super. 216, 130 A.2d 64 (App. Div.), *cert. denied*, 24 N.J. 465, 132 A.2d 558 (1957); *In re Heukelekian*, 24 N.J. Super. 407, 94 A.2d 501 (App. Div. 1953), though a more recent decision of the New Jersey Supreme Court in a case involving the commitment of a person acquitted by reason of insanity has cast some doubt on the continued validity of these cases. *State* v. *Krol*, 68 N.J. 326, 344 A.2d 289 (1975). *See* Note, 7 Seton Hall L. Rev. 412 (1976).

[28] Arizona, Colorado, Connecticut, Delaware, Iowa, Louisiana, Maine, Maryland, Michigan, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington. *See* Appendix *infra*.

[29] *Lynch* v. *Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974); *In re Beverly*, 342 So. 2d 481 (Fla. 1977); *In re Stephenson*, 67 Ill. 2d 544, 367 N.E.2d 1273 (1977); *State ex rel. Hawks* v. *Lazaro*, 202 S.E.2d 109 (W. Va. 1974).

[30] California appears to be the only State which distinguishes between procedures applicable where commitment is to ensure an individual's safety and survival, and where it is intended to prevent injury or other harm to others. Under California's Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5001 *et seq.*), separate procedures govern the commitment of "gravely disabled" individuals and individuals who are alleged to be "imminently dangerous." A "gravely disabled" person is defined as one who, "as a result of a mental disorder, is unable to provide for his personal needs for food, clothing, or shelter." Welf. & Inst. Code § 5008(h). In a proceeding to commit an "imminently dangerous" person, the state must show "threatened, attempted, or actual physical harm to the person of another as well as an imminent threat of physical harm to others by reason of a mental disorder." *In re Estate of Roulet*,

acted civil commitment statute requires "proof beyond a reasonable doubt with respect to any physical facts or evidence, and clear and convincing evidence as to all other matters, except that mental disorders shall be evidenced to a reasonable medical certainty." [31]

Only one state—Mississippi—still specifies the preponderance of the evidence standard in its civil commitment statute.[32] Texas, as shown by this case, now requires preponderance of the evidence by judicial decision. The remaining eleven states do not specify the standard of proof for indefinite commitment of the mentally ill in

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supra, 574 P.2d at 1258. *See* Welf. & Inst. Code § 5300 *et seq.* In the *Roulet* case, the California Supreme Court upheld the lesser procedural safeguards applicable in "grave disability" proceedings against an equal protection challenge. In rejecting an argument that jury unanimity should be required in "grave disability" proceedings, the court remarked on the different interests of the State in the two commitment situations:

> "The verdict disparity between imminent danger proceedings and grave disability proceedings is justified because the persons subject to the different procedures are not similarly situated. Unlike a gravely disabled person, an imminently dangerous person poses a threat of harm to others. This danger gives rise to a governmental interest, analogous to the governmental interest in criminal proceedings. When the government's actions are motivated not only by benevolence toward the individual, but also by an interest in protecting others from the individual's behavior, potential for abuse exists. The proceedings may be misused as a substitute for criminal prosecution, justifying the additional safeguard of jury unanimity to protect the individual against the risk of error. . . . This additional governmental interest is reflected by the fact that commitment of those found to be imminently dangerous is mandatory. . . . Because this interest is not present in grave disability proceedings, imminently dangerous and gravely disabled persons are not similarly situated." 574 P.2d at 1250-51.

[31] Mont. Rev. Codes Ann. § 38-1305(7) (1977 Supp.)

[32] Miss. Code Ann. § 41-21-75 (1977 Supp.)

their statutes and do not appear to have reported decisions addressing the issue.[33]

The above summary shows that nearly three-quarters the States—thirty-seven and the District of Columbia—now require a higher standard of proof than preponderance of the evidence. By contrast, as late as 1974 "the preponderance standard [was] apparently in use in most jurisdictions." *Developments—Civil Commitment*, *supra*, at 1290. And, although in 1974 it was said that "[c]ommitment statutes generally do not specify the burden of proof necessary to commit," *id.* at 1290, n. 201, twenty-seven States have now adopted a high standard of proof by statute.

It is true that both state and federal courts are divided on the issue of whether the standard of proof in civil commitment proceedings should be "beyond a reasonable doubt," or what many regard as the less rigorous standard of "clear and convincing proof." [34] But where an

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[33] Alaska, Arkansas, Georgia, Indiana, Missouri, Nevada, New York, Rhode Island, Vermont, Virginia, Wyoming. The question of the proper standard of proof under the Vermont civil commitment statute was recently presented to the Vermont Supreme Court in *State* v. *O'Connell*, 383 A.2d 624 (Vt. 1978), a case in which the trial court had applied the preponderance standard. The Vermont Supreme Court reversed the commitment order on grounds that the trial court had failed to make the finding of present mental illness required by the statute, and hence did not reach the question of whether the preponderance standard was adequate. In New York, preponderance of the evidence has been held sufficient where commitment is temporary. *Fhagen* v. *Miller*, 65 Misc.2d 168, 317 N.Y.S. 2d 128 (Sup. Ct. 1970), *aff'd*, 36 A.D.2d 926, 321 N.Y.S.2d 61, *aff'd*, 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393 (1972), *cert. denied*, 409 U.S. 845 (1972) (involving 15- and 60-day commitment orders). Under New York law, commitment orders may never be for an indefinite period; they expire after a stated term, whose maximum in any case is two years. N.Y. Mental Hyg. Law § 31.33(d) (McKinney) (1975 ed. & 1978 Supp.)

[34] The "clear and convincing" standard of proof has been required by this Court in civil cases where governmental actions have a significant impact upon individual rights, *see, e.g.*, *Woodby* v.

otherwise free individual stands to be deprived indefinitely of that freedom, the verdict against the preponderance standard has been virtually unanimous. Even when courts have shown reluctance to require proof beyond a reasonable doubt, usually for one or more of the reasons cited by the Texas Supreme Court in the *Turner* case, they have not given serious consideration to the preponderance standard as an alternative.[35]

In those States which have opted in favor of a "clear and convincing" standard of proof, as opposed to the reasonable doubt standard, the principal concern appears to be the possibility, because of the current state of medical knowledge, that many mentally disabled people would go uncared for if a fact-finder were obliged to exclude

Immigration and Naturalization Service, 385 U.S. 276, 285-86 (1966); and where constitutional interests are at stake in civil litigation, *see, e.g., Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 50-51 (1971). The general assumption that that standard requires a significantly higher degree of certitude from the fact-finder than the preponderance standard has been empirically demonstrated. Underwood, *supra*, 86 Yale L.J. at 1309-11. It is much less clear, however, whether juries recognize the difference between the "clear and convincing" and "reasonable doubt" standards. *Id.* It appears, however, that many judges believe there to be one in the civil commitment context. *See, e.g., State ex rel. Hawks* v. *Lazaro*, 202 S.E.2d 109, 127 (W. Va. 1974) (rejects both preponderance and reasonable doubt standards, requires "proof that is clear, cogent and convincing"); *In re Stephenson*, 67 Ill. 2d 544, 367 N.E.2d 1273 (1977) (same, requires "clear and convincing" evidence); *Lynch* v. *Baxley*, 386 F. Supp. 378 (D. Ala. 1974) (same). And of course the Texas courts involved at various points in Addington's case appear to have assumed that the reasonable doubt standard would place on the State a significantly greater burden of persuasion than the "clear, unequivocal and convincing evidence" standard employed by the trial court. *But see Superintendent of Worcester State Hospital* v. *Hagberg*, —— Mass. ——, 372 N.E.2d 242, 246 (1978) (reasonable doubt standard; "we doubt the utility of employing three standards of proof when two seem quite enough"); and *In re Levias*, 83 Wash. 2d 253, 517 P.2d 588, 590 (1973) (clear and convincing is the "civil counterpart" of reasonable doubt).

[35] *See, e.g.*, the cases cited at note 15, *supra*.

every reasonable doubt with respect to the need for confinement. But there is no evidence that in the dozen or so states which do require proof beyond a reasonable doubt, commitment has been "impossible," or indeed that the State has not continued to prevail in a substantial portion of those cases in which it seeks indefinite confinement.[36] There may of course be other explanations for this phenomenon; it may be, for example, that there are not as many commitment proceedings initiated, and that alternatives to commitment are more seriously considered in those States where a heavy burden of persuasion has been placed on the state to show that commitment is necessary "beyond a reasonable doubt."[37] It may also be that the distinction between "clear and convincing" and "reasonable doubt" seen by some of these courts is less real as a practical matter than a reflection of a felt sense of not wanting to apply a term associated with criminal prosecutions to a process in which helpless and guiltless human beings are often caught up. *See, e.g., In re Levias*, 83 Wash. 2d 253, 517 P.2d 588 (1973). This sense of propriety, of not wanting further to stigmatize

[36] *See, e.g.*, Zander, *Civil Commitment in Wisconsin: The Impact of Lessard* v. *Schmidt*, 1976 Wis. L. Rev. 503, 557-59 (1976); Mental Health Divison, Hawaii State Department of Health, *A Review of Admissions to Hawaii State Hospital*, Report Prepared for Third Conference on the Law, May 15-16, 1978, at 4.

[37] In many of the States requiring proof beyond a reasonable doubt, and in some requiring "clear and convincing" proof, the fact-finder must find that there is no suitable alternative means of caring for a mentally ill individual that would be less restrictive than hospitalization. *See, e.g.*, Mass. Ann. Laws ch. 123, § 8 (1972 ed. & 1978 Supp.); Minn. Stat. Ann. § 253A.02 (1971 ed. & 1978 Supp.); Tenn. Code Ann. § 33-604(d) (1977 ed.); Utah Code Ann. § 64-7-36(6) (1977 ed. & 1978 Supp.). *See also* Va. Code § 37.1-67-3 (1950 ed. & 1977 Supp.). In a study of civil commitment in two Wisconsin counties, the significantly lower commitment rate in one was explained in part by that county's "case-by-case effort to secure alternative treatment for otherwise committable defendants." Zander, *supra*, 1976 Wis. L. Rev. at 558.

a mentally ill individual, may in some cases be entirely understandable and appropriate. But where the gravamen of the proceeding itself is to impose the quasi-criminal stigma of "dangerous to the community," a sharp reminder of the need to be extraordinarily cautious is in order.

Respectfully submitted,

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APPENDIX

APPENDIX

Introduction:

This Appendix surveys, in tabular form, the substantive standards for extended confinement under present State civil commitment laws, the type of proceeding provided, the applicable standard of proof, and the maximum duration of a commitment order. We have attempted to obtain this information from the most recent available editions of each State's statutes, including supplements, and from session laws, as noted in the first column of the Table. In many States, civil commitment laws have undergone sweeping changes in the past several years, all of which may not yet be reflected in the statute books. In a number of other States, the process of statutory change is still underway. For this reason, the information contained in this Appendix may not be either complete or entirely current.

Criteria for Extended Confinement of the Mentally Ill:

In the second column of the Table, the substantive criteria for extended confinement are for the most part reproduced verbatim from the statutes. Most States make separate provision in their statutes for emergency or short-term confinement, for periods ranging from 48 hours to 60 days; we have not shown the extent to which the substantive criteria for confinement under these provisions differ from those which warrant confinement for extended periods of time. There has been no attempt to incorporate judicial construction of these criteria except where it would substantially narrow or clarify them. In most States, a finding of "mental illness" must accompany a finding on the other substantive criteria, before a commitment order can be issued. But this independent criterion has not been separately noted in the Table, except where the definition of "mental illness" itself incorporates

additional criteria for commitment. Where alternative grounds for confinement are clearly demarcated as such in the statute, they have been separately listed; where apparently alternative grounds are combined in a single phrase in the statute, they have not been separated.

Maximum Duration of Commitment Order:

The third column of the Table indicates the maximum period of time for which an individual may be confined pursuant to a judicial commitment order. Some statutes specify that a commitment order is for an indefinite or indeterminate period, and some specify no maximum period. Of statutes in the latter category, complementary statutory provisions on termination of confinement or periodic reporting obligations suggest that it is in fact for an indefinite time, usually until the person is no longer "mentally ill." Clarifying comments have been made where possible. In an increasing number of States, commitment orders are for a limited period of time; they may, however, be renewed upon petition to the court which issued the original order. In such cases, a full *de novo* hearing must be sought on the substantive grounds for commitment each time an order expires.

Right to Jury Trial:

All but three States provide for a judicial determination on the substantive criteria for commitment before an individual may be confined for an extended period of time. In Maryland, Nebraska, and South Dakota, involuntary commitment orders are issued by an administrative body. In some State statutes, a right to jury trial is explicitly provided, while in others there is no mention of a jury right. Only one State, Alabama, specifically denies a right to a jury trial in a judicial commitment proceeding. There has been no attempt to indicate which States may provide for jury trial in civil proceedings generally, so that a failure separately to specify a jury right in commitment procedings need not mean that one is not available. Where the statute does not mention the availability of a jury trial, the Table indicates the court of competent jurisdiction in which the trial or hearing is held.

Standard of Proof:

Where the statute explicitly calls for a particular standard of proof, the Table so indicates. Where the statute is silent with respect to the standard of proof, but there has been an authoritative judicial interpolation of the appropriate standard, this has also been indicated. In a few cases where the statute is silent, judicial decisions on closely related issues suggest that a particular standard of proof will be applied; this has been indicated by footnotes at the appropriate place in the Table itself

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
ALABAMA Ala. Code tit. 22, § 52-1 et seq. (1975 ed. & 1977 Supp.)	"poses a real and present threat of substantial harm to himself or to others"; "the threat of substantial harm has been evidenced by a recent overt act"; and "treatment is available for the person's mental illness or . . . confinement is necessary to prevent the person from causing substantial harm to himself or to others" (§ 52-10)	Unspecified	No (§ 52-9(4))	"clear, unequivocal and convincing evidence" (Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974))
ALASKA Alaska Stat. § 47.30.010 et seq. (1962 ed. & 1977 Supp.)	(1) "likely to injure himself or others if allowed to remain at liberty" or (2) "is in need of immediate care or treatment in a hospital" and "lacks sufficient insight or capacity to make responsible decisions concerning hospitalization" (§ 47.30.070(1))	"Indeterminate" (§ 47.30.070(1))	Yes (§ 47.30.070)	Unspecified, no cases construing
ARIZONA Ariz. Rev. Stat. Ann. § 36-501 et seq. (1974 ed. & 1977 Supp.), 1977 & 1978 Ariz. Sess. Laws, through June 1978	(1) "a danger to himself and in need of treatment" (2) "a danger to others and in need of treatment" or (3) "gravely disabled" (§ 36-540)	180 days (§ 36-540)	Unspecified (trial in superior court) (§ 36-501(2))	"clear and convincing evidence" for dangerous person; unspecified for gravely disabled (§ 36-540)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
ARKANSAS Ark. Stat. Ann. § 59-101 et seq. (1971 ed. & 1977 Supp.)	"dangerous to himself or to society" (§ 59-408)	"for such time as the [State] deems necessary for proper care and treatment" (§ 59-408)	Yes (§ 59-101)	Unspecified, no cases construing
CALIFORNIA Cal. Welf. & Inst. Code, § 5000 et seq. (West) (1972 ed. & 1978 Supp.), 1978 Cal. Legis. Serv., though June 1978	(1) "imminently dangerous:" person who has "threatened, attempted, or actually inflicted physical harm upon the person of another . . . and . . . presents an imminent threat of substantial physical harm to others" (§ 5304)	(1) 90 days (§ 5304)	(1) Yes (§ 5302)	(1) "clear and convincing proof" (In re Estate of Roulet, 20 Cal. 3d 653, 143 Cal. Rptr. 893, 574 P.2d 1245 (1978))
	(2) gravely disabled: "a condition in which a person, as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter" (§ 5008(h))	(2) One year conservatorship (§ 5360) (court may empower conservator to hospitalize) (§ 5358)	(2) Yes (§ 5350(d))	(2) Unspecified [1/]
COLORADO Colo. Rev. Stat. § 27-10-101 et seq. (1973 ed. & 1976 Supp.), 1977 Colo. Sess. Laws	"danger to others or to himself or gravely disabled" (§ 27-10-111)	One year (§ 27-10-109)	Yes (§ 27-10-109)	"clear and convincing evidence" (§ 27-10-111)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
CONNECTICUT Conn. Gen. Stat. Ann. § 17 (West) (1978 Supp.)	"dangerous to himself or herself or others or gravely disabled" (§ 17-178)	"for the period of the duration of such mental illness" (§ 17-178)	Unspecified (trial in probate court) (§ 17-177)	"clear and convincing evidence" (§ 17-178)
DELAWARE Del. Code Ann. § 5001 et seq. (1977 ed.)	mental disease or condition "which either (i) renders such person unable to make responsible decisions with respect to his hospitalization, or (ii) poses a real and present threat, based upon manifest indications, that such person is likely to commit or suffer serious harm to himself or others or to property" (§ 5001, §.5010)	"Indefinite" (mandatory report to court every 6 months) (§ 5012)	Unspecified (trial in superior or family court) (§ 5001)	"clear and convincing evidence" (§ 5010)
DISTRICT OF COLUMBIA D.C. Code Ann. § 21-501 et seq. (1973 ed. & 1978 Supp.)	"likely to injure himself or others" (§ 21-545)	"Indeterminate" (§ 21-545)	Yes (§ 21-545)	Beyond a reasonable doubt (In re Ballay, 482 F.2d 648 (D.C. Cir. 1973); In re Hodges, 325 A.2d 605 (D.C. 1974))
FLORIDA Fla. Stat. Ann. § 394.451 et seq. (West) (1976 ed. & 1978 Supp.)	"likely to injure himself or others . . . or in need of care or treatment and lacks sufficient capacity to make a responsible application on his own behalf" (§ 394.467)	One year (§ 394.467)	Unspecified (trial in county court) (§ 394.467)	"clear and convincing evidence" (In re Beverly, 342 So. 2d 481) (Fla. 1977))

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State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
GEORGIA Ga. Code Ann. § 88-501 et seq. (1971 rev. ed. & 1977 Supp.), 1977 Ga. Laws	(1) "likely to injure himself or others" or (2) "incapable of caring for his physical health and safety" (§ 88-507.1)	6 months (§ 88-507.3(j))	Unspecified (trial in county "court of ordinary") (§ 88-507.2)	Unspecified, no cases construing
HAWAII Haw. Rev. Stat. § 334-1 et seq. (1976 ed. & 1977 Supp.)	"mentally ill or suffering from substance abuse" and "dangerous to himself or others or to property" and "is in need of care and/or treatment, and there is no suitable alternative . . . which would be less restrictive" (§ 334-60)	90 days (§ 334-60)	Unspecified (trial in "any duly constituted court") (§ 334-60)	Beyond a reasonable doubt (§ 334-60)
IDAHO Idaho Code § 66-317 et seq. (1973 ed. & 1977 Supp.), 1977 & 1978 Idaho Sess. Laws, through June 1978	"likely to injure himself or others" (§ 66-329)	Unspecified (mandatory evaluation to be filed with court every four months) (§ 66-329)	Unspecified (trial in district court) (§ 66-328)	Beyond a reasonable doubt (§ 66-329)

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State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
ILLINOIS Ill. Stat. Ann. ch. 91-1/2, § 1-11 et seq. (Smith-Hurd) (1966 ed. & 1978 Supp.)	"reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs" (§ 1-11, § 8-1)	Unspecified (mandatory report to court every two years) (§ 10-2)	Yes (§ 9-2)	"clear and convincing proof" (In re Stephenson, 67 Ill. 2d 544, 367 N.E. 2d 1273 (Ill. 1977))
INDIANA Ind. Code Ann. § 16-14-9.1-1 et seq. (Burns) (1973 ed. & 1977 Supp.), 1977 Ind. Acts	"gravely disabled or dangerous" and "in need of custody, care, or treatment, or in need of continued custody, care, or treatment" (§ 16-14-9.1-10(d))	Unspecified (mandatory annual report to court) (§ 16-14-9.1-10)	Unspecified (trial in probate court) (§ 16-14-9.1-5)	Unspecified, no cases construing
IOWA Iowa Code Ann. § 225.1 et seq. (West) (1967 ed. & 1978 Supp.), 1978 Iowa Legis. Serv., through June 1978	"a person who is afflicted with mental illness and because of that illness lacks sufficient judgment to make responsible decisions with respect to his or her hospitalization or treatment, and who: a. Is likely to physically injure himself or herself or others if allowed to remain at liberty without treatment; or b. Is likely to inflict serious emotional injury on members of his or her family or	Unspecified (mandatory report to court every 60 days) (§ 229.15)	Unspecified (trial in district court) (§ 229.6)	"clear and convincing evidence" (§ 229.12)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
IOWA	[continued from previous page] others who lack reasonable opportunity to avoid contact with the afflicted person if the afflicted person is allowed to remain at liberty without treatment" (§ 229.1, § 229.14)			
KANSAS Kan. Stat. § 59-2901 et seq. (1976 ed. & 1977 Supp.), 1977 Kan. Sess. Laws	"any person who is mentally impaired to the extent that such person is in need of treatment and who is dangerous to himself or herself or others and (a) who lacks sufficient understanding or capacity to make responsible decisions with respect to his or her need for treatment, or (b) who refuses to seek treatment, except that no person who is being treated with prayer in the practice of the religion of any church which teaches reliance on spiritual means alone through prayer for healing shall be determined to be a mentally ill person unless substantial evidence is produced upon which the district court finds that the proposed patient is dangerous to himself or herself or others. Proof of a person's failure to meet his or her basic physical needs, to the extent that such failure threatens such person's life, shall be deemed as proof that such person is dangerous to himself or herself" (§ 59-2902)	Unspecified (mandatory report to court every 90 days) (§ 59-2917)	Yes (§ 59-2917)	Beyond a reasonable doubt (§ 59-2917)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
KENTUCKY Ky. Rev. Stat. Ann. § 202A.010 et seq. (Baldwin) (1969 ed. & 1977 Supp.)	"presents an immediate danger or an immediate threat of danger to self or others . . . and can reasonably benefit from treatment" (§ 202A.080)	360 days (§ 202A.080)	Yes (§ 202A.080)	Beyond a reasonable doubt (Denton v. Commonwealth, 383 S.W. 2d 681 (Ky. 1964))
LOUISIANA La. Rev. Stat. Ann. ch. 28 § 1 et seq. (West) (1975 ed. & 1978 Supp.)	"danger to himself or others or gravely disabled" (§ 54)	"Indefinite" ("for the period of the duration of such mental illness or until he is discharged or conditionally discharged") (§ 55)	Unspecified (trial in "any duly constituted civil court") (§ 55)	"clear and convincing evidence" (§ 55)
MAINE Me. Rev. Stat. tit. 34, § 2251 et seq. (1978 ed.)	"poses likelihood of serious harm" and "inpatient hospitalization is the means best available for the treatment of the patient" (§ 2334)	One year (§ 2334)	Unspecified (trial in district court) (§ 2334)	"clear and convincing evidence" (§ 2334)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
MARYLAND Md. Ann. Code, art. 59, § 1 et seq. (1972 ed. & 1977 Supp.), 1977 Md. Laws	"in need of institutional inpatient care or treatment," and "presents a danger to his own life or safety or the life or safety of others" (Reg. 10.04.03G Department of Health and Mental Hygiene)	Unspecified	Unspecified[2/] (administrative hearing officer) (§ 12) (see also Reg. 10.04.03G, Department of Health and Mental Hygiene)	"clear and convincing evidence" (Reg. 10.04.03G, Dept. of Health and Mental Hygiene)
MASSACHUSETTS Mass. Ann. Laws ch. 123, § 1 et seq. (Michie/Law. Co-op.) (1972 ed. & 1978 Supp.)	(1) "a substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm" (2) "a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them" or (3) "a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community" (§ 8)	One year (§ 8)	Unspecified (trial in district court) (§ 8)	Beyond a reasonable doubt (Super. of Worcester State Hospital v. Hagberg, ___ Mass. ___, 372 N.E. 2d 242 (1978))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
MICHIGAN Mich. Stat. Ann. § 14.800(400a) et seq. (1976 ed. & 1978 Supp.)	(1) A person who "can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself or another person, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation" (2) A person who "is unable to attend to those of his basic physical needs such as food, clothing, or shelter that must be attended to in order for him to avoid serious harm in the near future, and who has demonstrated that inability by failing to attend to those basic physical needs" or (3) A person "whose judgment is so impaired that he is unable to understand his need for treatment and whose continued behavior as the result of this mental illness can reasonably be expected, on the basis of competent medical opinion, to result in significant physical harm to himself or others" (§ 14.800(401))	"continuing hospitalization" for "an unspecified period of time" (§ 14.800(472))	Yes (§ 14.800(458))	"clear and convincing evidence" (§ 14.800(465))
MINNESOTA Minn. Stat. Ann. § 253A.01 et seq. (West) (1971 ed. & 1978 Supp.), 1978 Minn. Laws	"hospitalization is necessary for his own welfare or the protection of society; that is, that the evidence of his conduct clearly shows: (i) that he has attempted to or threatened to take his own life or	"Indeterminate" (§ 253A.07)	Unspecified (trial in probate court) (§ 253A.07)	Beyond a reasonable doubt (Lausche v. Commissioner of Public Welfare, 302 Minn. 65, 225 N.W. 2d

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
MINNESOTA	[continued from previous page] attempted to seriously physically harm himself or others; or (ii) that he has failed to protect himself from exploitation from others; or (iii) that he has failed to provide for his own needs for food, clothing, shelter, safety or medical care; and . . . [that the court] finds no suitable alternative to involuntary hospitalization" (§ 253A.02)			366 (1974), cert. denied, 420 U.S. 993 (1975))
MISSISSIPPI Miss. Code Ann. § 41-21-61 et seq. (1977 Supp.), 1977 Miss. Laws	"reasonably expected . . . to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury, or to provide for his own physical needs" (§ 41-21-62(c))	Unspecified (commitment order not appealable) (§ 41-21-75)	Unspecified (hearing before chancellor or special master) (§ 41-21-75)	Preponderance of the evidence (§ 41-21-75)
MISSOURI Mo. Ann. Stat. tit. 12, ch. 202 et seq. (Vernon) (1972 ed. & 1978 Supp.)	"in need of custody, care or treatment in a mental facility and, because of his mental condition, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization" (§ 202.807)	"Indeterminate" (§ 202.807)	Unspecified (trial in probate court) (§ 202.807)	Unspecified, no cases construing

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
MONTANA Mont. Rev. Codes Ann. § 38-1305 et seq. (1977 Supp.)	"suffering from a mental disorder which has resulted in self-inflicted injury or injury to others or the imminent threat thereof or which has deprived the person afflicted of the ability to protect his life or health" (§ 38-1302(14))	One year (§ 38-1306(4))	Yes (§ 38-1305(6))	"proof beyond a reasonable doubt with respect to any physical facts or evidence and clear and convincing evidence as to all other matters, except that mental disorders shall be evidenced to a reasonable medical certainty" (§ 38-1305(7))
NEBRASKA Neb. Rev. Stat. § 83-1001 et seq. (1977 Supp.), 1977 Neb. Laws, through June 1977	"mentally ill dangerous person" for whom neither "voluntary hospitalization or other treatment alternatives less restrictive of the subject's liberty" are available (§ 83-1036) "mentally ill dangerous person" defined as one who presents: (1) "A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm" or (2) "A substantial risk of serious harm to himself within the near future, as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm, or evidence of inability to provide for basic human needs" (§ 83-1009)	Unspecified	Unspecified (administrative hearing before Mental Health Board) (§ 83-1035)	"clear and convincing proof" (§ 83-1035)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
NEVADA Nev. Rev. Stat. § 433A (1975 ed. & 1977 Supp.), 1977 Nev. Stats. through September 1977	"likely to harm himself or others if allowed to remain at liberty, or is gravely disabled" (§ 433A.310(1)(b))	6 months (§ 433A.310(2))	Unspecified (trial in district court) (§ 433A.310(1))	Unspecified, no cases construing
NEW HAMPSHIRE N.H. Rev. Stat. Ann. § 135-B:26 et seq. (1977 ed.)	"in such mental condition as a result of mental illness as to create a potentially serious likelihood of danger to himself or to others" (§ 135-B:26)	Two years (§ 135-B:38)	Unspecified (trial in probate court) (§ 135-B:38)	Beyond a reasonable doubt (Proctor v. Butler, 380 A.2d 673 (N.H. 1977))
NEW JERSEY N.J. Stat. Ann. § 30:4-1 et seq. (West) (1977 Supp.), 1977 N.J. Laws, 1978 N.J. Sess. Law Serv. through April 1978	"requires care and treatment for his own welfare, or the welfare of others, or of the community" (§ 30:4-44, § 30:4-23)	Unspecified	Unspecified (trial in county court) (§ 30:4-44)	Unspecified [3]

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
NEW MEXICO N.M. Stat. Ann. § 34-2A-1 et seq. (1977 Supp.), 1977 N.M. Laws	"as a result of a mental disorder the client presents a likelihood of danger to himself or others; the client's condition is likely to improve with the proposed treatment; and the proposed commitment is consistent with the least drastic means principle" (§ 34-2A-10)	120 days (§ 34-2A-11(c))	Yes (§ 34-2A-11(b))	"clear and convincing evidence" (§ 34-2A-11(c))
NEW YORK N.Y. Mental Hyg. Law § 31.27 et seq. (McKinney) (1975 ed. & 1978 Supp.), 1978 N.Y. Laws, through May 1978	"in need of involuntary care and treatment" (§ 31.31)	Two years (§ 31.33(d))	Unspecified (trial in supreme court or county court) (§ 31.33(d))	Unspecified [4/]
NORTH CAROLINA N.C. Gen. Stat. § 122-58.1 et seq. (1974 ed. & 1977 Supp.)	"mentally ill or inebriate, and imminently dangerous to himself or others" (§ 122-58.7(i))	One year (§ 122-58.11(e))	Unspecified (trial in district court) (§ 122-58.7(a))	"clear, cogent and convincing evidence" (§ 122-58.7(i))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
NORTH DAKOTA N.D. Cent. Code § 25-01-01 et seq. (1970 ed. & 1977 Supp.)	(1) "A person who is mentally ill, an alcoholic, or a drug addict and who as a result of such condition can reasonably be expected within the near future to intentionally or unintentionally seriously physically harm himself or another person, and who has engaged in an act or acts or made significant threats that are substantially supportive of this expectation" or (2) "A person who is mentally ill, an alcoholic, or a drug addict and who as a result of such condition is unable to attend to his basic physical needs, such as food, clothing, or shelter, that must be attended to for him to avoid serious harm in the near future, and who has demonstrated that inability by failing to meet those basic physical needs" (§ 25-03.1-02(11))	"continuing hospitalization order" (status reports required to be filed with the court every 6 months) (§ 25-03.1-31)	Unspecified (trial in county court) (§ 25-03.1-19)	"clear and convincing evidence" (§ 25-03.1-20)
OHIO Ohio Rev. Code Ann. § 5122.01 et seq. (Page) (1970 ed. & 1977 Supp.), 1977 & 1978 Ohio Laws, through May 1978	"person who . . . (1) Represents a substantial risk of physical harm to himself as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm; (2) Represents a substantial risk of harm to others as manifested by evidence of recent homicidal or other violent behavior	Two years (§ 5122.15(H))	Unspecified (hearing in probate court) (§ 5122.01(Q))	"clear and convincing evidence" (§ 5122.15(B))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
OHIO	[continued from previous page] or evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm; (3) Represents a substantial or immediate risk of serious physical impairment or injury to himself as manifested by evidence that he is unable to provide for and is not providing for his basic physical needs because of his mental illness and that appropriate provision for such needs cannot be made immediately available in the community; or (4) Would benefit from treatment . . . and is in need of [it] as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or himself" (§ 5122.01, § 5122.15(B))			

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
OKLAHOMA Okla. Stat. Ann. tit. 43A, § 54.1 et seq. (West) (1977 ed.), 1977 & 1978 Okla. Sess. Laws, through April 1978	(1) "A person who has a demonstrable mental illness and who as a result of that mental illness can be expected within the near future to intentionally or unintentionally seriously and physically injure himself or another person" or (2) "A person who has a demonstrable mental illness and who as a result of that mental illness is unable to attend to those of his basic physical needs such as food, clothing or shelter that must be attended to in order for him to avoid serious harm in the near future and who has demonstrated such inability by failing to attend to these basic physical needs in the recent past" (§ 3(e), § 54.1(A)(1))	Unspecified	Yes (§ 54.1(B)(4))	Beyond a reasonable doubt (§ 54.1(C))
OREGON Or. Rev. Stat. § 426.005 et seq. (1977 Cum. Supp.), 1977 Or. Laws	(1) "Dangerous to himself or others" or (2) "Unable to provide for his basic personal needs and is not receiving such care as is necessary for his health or safety" (§ 426.005, § 426.130)	180 days (§ 426.070)	Unspecified (trial in probate court) (§ 426.070)	Beyond a reasonable doubt (§ 426.130)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
PENNSYLVANIA Pa. Cons. Stat. Ann. tit. 50, § 7301 et seq. (Purdon) (1969 ed. & 1978 Supp.) 1978 Pa. Legis. Serv., through April 1978	"poses a clear and present danger of harm to others or to himself" "Determination of Clear and Present Danger - (1) Clear and present danger to others shall be shown by establishing that within the past 30 days the person has inflicted or attempted to inflict serious bodily harm on another and that there is a reasonable probability that such conduct will be repeated . . . ." "(2) Clear and present danger to himself shall be shown by establishing that within the past 30 days: (i) the person has acted in such manner as to evidence that he would be unable, without care, supervision and the continued assistance of others, to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety, and that there is a reasonable probability that death, serious bodily injury or serious physical debilitation would ensue within 30 days unless adequate treatment were afforded under this act; or (ii) the person has attempted suicide and that there is the reasonable probability of suicide unless adequate treatment is afforded under this act; or (iii) the person has severely mutilated himself or attempted to mutilate himself severely and that there is the reasonable probability of mutilation unless adequate treatment is afforded under this act." (§ 7301)	90 days (§ 7304(g))	Unspecified (trial in court of common pleas) (§ 7115(a))	"clear and convincing evidence" (§ 7304(f))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
RHODE ISLAND R.I. Gen. Laws § 26-2 (1957 ed. & 1977 Cum. Supp.)	"detention . . . necessary for his own welfare or for the safety of the public" (§ 26-2-3)	Until patient "be restored to soundness of mind" or detention "no longer necessary for his own welfare or for the safety of others" (§ 26-2-3)	Unspecified (trial in district court) (§ 26-2-3)	Unspecified, no cases construing
SOUTH CAROLINA S.C. Code § 44-17 (1976 ed. & 1977 Supp.)	(1) "lacks sufficient insight or capacity to make responsible decisions with respect to his treatment" or (2) "there is a likelihood of serious harm to himself or others" (§ 44-17-580)	Unspecified	Not specified (trial in probate court) (§ 44-17-620)	"clear and convincing evidence" (§ 44-17-580)
SOUTH DAKOTA S.D. Codified Laws Ann. § 27A-1-1 et seq. (1976 ed. & 1977 Supp.)	(1) "He lacks sufficient understanding or capacity to make responsible decisions concerning his person so as to interfere grossly with his capacity to meet the ordinary demands of life" or (2) "He is a danger to himself or others" (§ 27A-1-1) Person must be found to be "in need of treatment" (§ 27A-9-18)	Unspecified	Unspecified (administrative hearing by County Board of Mental Illness) (§ 27A-9-16)	"clear and convincing evidence" (§ 27A-9-18)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
TENNESSEE Tenn. Code Ann. § 33-301 et seq. (1977 ed.)	"possesses a likelihood of serious harm," and "all available less drastic alternatives to commitment to a mental hospital or treatment resource are unsuitable" (§ 33-604(d))	Unspecified	Yes (Craddock v. Calcutt, 285 S.W. 2d 528 (1955))	"clear, unequivocal and convincing evidence" (§ 33-604(d))
TEXAS Tex. Rev. Civ. Stat. art. 5547 (Vernon) (1958 ed. & 1978 Supp.)	"for his own welfare and protection or the protection of others" (§ 52(b))	"Indefinite" (§ 52(b))	Yes (§ 48)	Preponderance of the evidence (State v. Turner, 546 S.W. 2d 563 (1977) cert. denied, 46 U.S.L.W. 3586 (March 20, 1978))
UTAH Utah Code Ann. § 64-7-1 et seq. (1977 ed. & 1978 Supp.)	(1) "There is an immediate danger that the proposed patient will injure himself . . . if allowed to remain at liberty" or (2) "Is in need of custodial care or treatment in a mental health facility" and "(i) lacks sufficient insight to make responsible decisions as to the need for care and treatment as demonstrated by evidence of unwillingness or inability to follow through with treatment, the need for said treatment having been adequately demonstrated to the courts, or (ii) lacks sufficient capacity to provide himself . . . with the basic necessities of life" (§ 64-7-36(6))	"Indeterminate period" (§ 64-7-36(7))	Unspecified (trial in district court) (§ 64-7-36(1))	Beyond a reasonable doubt (§ 64-7-36(6))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
UTAH	[continued from previous page] In both cases, court must find that there is "no appropriate less restrictive alternative to a court order of hospitalization" (§ 64-7-36(6))			
VERMONT Vt. Stat. Ann. tit. 18, ch. 171 (1968 ed. & 1977 Supp.)	(1) "presents a substantial risk of injury to himself or others if allowed to remain at liberty" or (2) "lacks sufficient insight or capacity to make a responsible decision concerning his mental condition and is in need of custody, care or treatment" (§ 7607)	"Indeterminate period" (§ 7608)	Unspecified (trial in probate court) (§ 7607)	Unspecified, no cases construing
VIRGINIA Va. Code § 37.1-1 et seq. (1950 ed. & 1977 Supp.), 1978 Va. Acts	"such person (a) presents an imminent danger to himself or others as a result of mental illness, or (b) has otherwise been proven to be so seriously mentally ill as to be substantially unable to care for himself, and (c) that there is no less restrictive alternative to institutional confinement" (§ 37.1-67-3)	180 days (§ 37.1-67-3)	Unspecified (trial in district court) (§ 37.1-67-3) (jury trial available on appeal) § 37.1-67-6)	Unspecified, no cases construing

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
WASHINGTON Wash. Rev. Code Ann. § 71.05.020 et seq. (1975 ed. & 1977 Supp.)	(1) "has threatened, attempted or inflicted physical harm upon the person of another," and "as a result of mental disorder presents a likelihood of serious harm to others" or (2) continues to be "in danger of serious physical harm resulting from a failure to provide for his essential human needs" (§ 71.05.320, § 71.05.020)	180 days (§ 71.05.320)	Yes (§ 71.05.310)	"clear, cogent and convincing evidence" (§ 71.05.310)
WEST VIRGINIA W.Va. Code, § 27-1-2 et seq. (1976 ed. & 1977 Supp.), 1977 W.Va. Acts	"likely to cause serious harm to himself or to others if allowed to remain at liberty" (§ 27-5-4(d))	"Indeterminate" (§ 27-5-4(d))	Unspecified (trial in circuit court) (§ 27-5-1)	"clear, cogent, and convincing proof" (State ex rel. Hawks v. Lazaro, 202 S.E. 2d 109 (W. Va. 1974))
WISCONSIN Wis. Stat. Ann. § 51.001 et seq. (West) (1957 ed. & 1977 Supp.), 1977 Wis. Laws, 1978 Wis. Legis. Serv., through May 1978	"1. Is mentally ill, drug dependent, or developmentally disabled and is a proper subject for treatment; and either 2. Is dangerous because of: a. A substantial risk of physical harm to the subject individual as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm; or b. A substantial risk of physical harm to other persons as manifested by evidence of recent homicidal or other violent behavior,	One year (§ 51.20(14)(g))	Yes (§ 51.20(12))	Beyond a reasonable doubt (§ 51.20(14)(e))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
WISCONSIN	[continued from previous page] or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do such physical harm; or 3. Evidences a very substantial risk of physical impairment or injury to the subject individual, as manifested by evidence that his or her judgment is so affected that he or she is unable to protect himself or herself in the community and that reasonable provision for his or her protection is not available in the community . . ." (§ 51.20(2))			
WYOMING Wyo. Stat. § 25-49 et seq. (1967 ed. & 1975 Supp.), 1976 & 1977 Wyo. Sess. Laws.	(1) "likely to injure himself or others" or (2) "is in need of care or treatment in a hospital and, because of his illness, lacks sufficient capacity to make responsible decisions with respect to his hospitalization" (§ 25-60(j))	Unspecified	Unspecified (trial in district court) (§ 25-60(i))	Unspecified, no cases construing

FOOTNOTES

4/ In New York, preponderance of the evidence has been held sufficient where commitment is temporary. Fhagen v. Miller, 65 Misc. 2d 168, 317 N.Y.S.2d 128 (Sup. Ct. 1970), aff'd, 36 A.D.2d 926, 321 N.Y.S.2d 61, aff'd, 29 N.Y.2d 348, 278 N.E.2d 926, 321 N.Y.S. 2d 393 (1972), cert. denied, 409 U.S. 845 (1972)(involving 15- and 60-day commitment orders).

2/ An alternative judicial procedure for commitment of the mentally ill appears to exist in the Estates and Trusts Article of the Maryland Code, but has not been widely used. Md. Est. & Trusts Code Ann. § 13-704 (1974 ed. & 1977 Supp.). This section provides that the court "may superintend and direct the care of a disabled person, appoint a guardian of the person, and pass orders and decrees respecting the person as seems proper, including an order directing the disabled person to be sent to a hospital." Procedures in such cases are to be in accordance with the Maryland Rules, which Rules in turn provide for a jury determination on the issue of mental disability. See Rules R-73, R-77 (b)(1).

3/ In New Jersey, the lower courts have held that the reasonable doubt standard applies to civil commitment of the mentally ill, see, e.g., In re J.W., 44 N.J. Super. 216, 130 A.2d 64 (App. Div.), cert. denied, 24 N.J. 465, 132 A.2d 558 (1957); In re Heukelekian, 24 N.J. Super. 407, 94 A.2d 501 (App. Div. 1953), though a more recent decision of the New Jersey Supreme Court in a case involving the commitment of an individual acquitted of a criminal charge by reason of insanity has cast some doubt on the continued validity of these cases. State v. Krol, 68 N.J. 326, 344 A.2d 289 (1975).

4/ In California, proof beyond a reasonable doubt is required in proceedings to commit "mentally disordered sex offenders," People v. Burnick, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975), and narcotics addicts, People v. Thomas, 19 Cal. 3d 630, 139 Cal. Rptr. 594, 566 P.2d 228 (1977). The California Supreme Court has contrasted the procedural requirements for grave disability proceedings with those applicable where the state seeks to commit "imminently dangerous" persons, suggesting that the proper analogue for commitments in the latter category would be those cases in which it has required proof beyond a reasonable doubt. See In re Estate of Roulet, 20 Cal. 3d 653, 143 Cal. Rptr. 893, 574 P.2d 1245 (1978).

No. 77-5992

In the Supreme Court of the United States

October Term, 1977

FRANK O'NEAL ADDINGTON,
Appellant,

vs.

THE STATE OF TEXAS,
Appellee.

Appeal From the Judgment of the Supreme Court of the State of Texas

BRIEF OF THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5992

FRANK O'NEAL ADDINGTON,
Appellant,

vs.

THE STATE OF TEXAS,
Appellee.

APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF OF THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The National Center for Law and the Handicapped was established in July, 1972, to advocate for the legal rights of all handicapped individuals through the provision of legal assistance, legal and social science research activities, and programs and processes of education and professional awareness.

The Center is jointly funded by the Bureau of Education for the Handicapped, Office of Education, and as a project of national significance by the Developmental Disabilities Office, Office of Human Development, of the United States Department of Health, Education, and Welfare. The Center's sponsoring agencies are the National Association for Retarded Citizens, the Family Law Division of the American Bar Association, the University of Notre Dame School of Law, and the Council for the Retarded of St. Joseph County (Indiana).

Assistance for disabled individuals is provided through direct legal intervention in selected cases and indirectly through consultation with attorneys, organizations, and individuals considering or involved in litigation. The Center has been admitted in numerous court cases, serving primarily in the role of *amicus curiae*.

The legal and social science staff also provides assistance to attorneys, legislators and various organizations working in areas involving the disabled through consultation, legal research and the drafting of model pleadings and briefs.

Research activities of the legal and social science staff are broad-based and multi-disciplinary in nature. They have been designed to facilitate legal reform and to allow a fuller realization of the legal rights of the handicapped.

Amicus has received consent from both appellant and appellee to file this brief. Their consents are on file with the Clerk of the Supreme Court.

QUESTION PRESENTED BY AMICUS

Whether a state, in depriving an allegedly mentally ill individual of his fundamental right to liberty through a process of involuntary civil commitment for an indefinite

period of time, may permissibly, pursuant to the Due Process Clause of the Fourteenth Amendment, apply a standard of proof less stringent than "beyond a reasonable doubt?"

STATEMENT OF THE CASE

Frank Addington was civilly committed to a psychiatric hospital for an indefinite period of time after a jury determined that he was mentally ill and that he required hospitalization in a mental hospital for his own welfare and protection or the protection of others. The trial court applied a standard of proof of "clear, unequivocal and convincing evidence."

Relying upon the decision of its sister court in *Turner* v. *State,* 542 S.W.2d 453 (Tex. Ct. App. 1976), the Texas Court of Civil Appeals reversed this decision, holding that the standard of proof of "beyond a reasonable doubt" is required in such proceedings. However, the Texas Supreme Court reversed the decision of the court of civil appeals, relying on its decision in *State* v. *Turner,* 556 S.W.2d 563 (1977).

In *State* v. *Turner,* the Texas Supreme Court adopted a standard of proof of preponderance of the evidence, relying on three basic distinctions between civil and criminal proceedings to justify a less stringent standard than that applied in criminal prosecutions. First, the court reasoned that the patient, although committed for an indefinite period of time, had a right to treatment, to periodic review, and to be released when no longer found to be a danger to self or others. Second, the court distinguished the need to make a determination of future conduct in a civil commitment from the assessment of past conduct which is made in a criminal case. Finally, the court justified

the lower standard by the rationale that psychiatry is not an exact medical science.

Frank Addington appealed the decision of the Texas Supreme Court and the United States Supreme Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The standard of proof required by due process in involuntary civil commitments must be determined by balancing the interests of the individual against the interests of the state. In Part I of this brief, *Amicus* argues that the individual's interest in liberty, when balanced against the state's decreasing interest in involuntary hospitalization, requires the utilization of a standard of proof greater than a mere preponderance of the evidence.

Until the middle of the nineteenth century, mentally ill persons were treated harshly, and they were often indiscriminately mixed with paupers and criminals. A reform movement aimed at providing treatment to individuals with mental illness led to the construction of massive, isolated mental hospitals during the latter half of the nineteenth century. Soon after, however, the focus of these institutions shifted to custody rather than treatment.

Until two decades ago, these institutions provided the only mechanism whereby the state could attempt to achieve its interests in protecting mentally ill individuals or in protecting society. However, in the past two decades, community-based residental and treatment services have been developed as an alternative to institutionalization on an extremely large scale. In addition, the available treatment is increasingly being sought on a voluntary basis by individuals who are mentally ill.

Thus, *amicus* contends that the state's need to involuntarily deprive an individual of his or her liberty in order to achieve its interests has been greatly diminished. The state's interests can be, and are being, achieved through other methods.

In analyzing the individual's fundamental interest in liberty, *amicus* argues that this interest is seriously abridged by involuntary civil commitment. *Amicus* cites the recognition which the Court has previously given to the deprivation of liberty which results from civil commitment and argues that the liberty interest in civil commitment is as important as the liberty interest presented in juvenile hearings and "mentally disordered sexual offender" cases, in which the Court has applied a reasonable doubt standard. In addition, *amicus* demonstrates that the liberty interest at issue in civil commitment is at least as important as the numerous individual's interests at stake in denaturalization and deportation proceedings, in which the Court has required that the evidence meet a standard of proof of clear and convincing evidence. *Amicus* asserts that the preponderance of the evidence standard applied in many routine civil matters is insufficient to constitutionally protect the individual's overriding right to liberty.

In Part II of this brief, *amicus* discusses the inexact nature of psychiatric "diagnoses" and the role of psychiatric evidence in the civil commitment process. The relevant literature is first reviewed to show that psychiatrists cannot reliably determine the threshold issues of whether an individual is mentally ill or whether an individual is in need of care and treatment. The relevant literature is then reviewed to show the inaccuracy of psychiatric predictions of future dangerousness.

Amicus illustrates that neither a reasonable doubt standard nor a clear and convincing standard can be realistically achieved by total reliance upon psychiatric evidence. *Amicus* urges that the standard of proof not be weakened merely because the civil commitment statutes define elements of proof which are too inexact to be reliably proven. It is suggested that by adopting elements of proof which are subject to objective consideration, the state's interest can be fulfilled without compromising the individual's liberty interest. Hence, *amicus* argues that the reasonable doubt standard is constitutionally required in civil commitment proceedings.

In Part III of this brief, *amicus* calls the Court's attention to the far-reaching implications of their decision. *Amicus* argues that the standard of proof required does substantially affect the ultimate determination of the trier of fact. *Amicus* then discusses the abuses which have resulted from the traditional informality in civil commitment hearings. *Amicus* asserts that the Court's decision on the standard of proof issue will have substantial impact upon the legislative trend to formalize commitment proceedings in a manner consistent with the liberty interests at stake.

Finally, *amicus* examines the evolving social policy of providing community care and treatment to other classes of handicapped individuals. While the case at Bar addresses the standard of proof in proceedings to civilly commit mentally ill individuals, the Court's decision will ultimately affect the processes for committing other handicapped individuals.

Amicus asserts that only by applying a reasonable doubt standard of proof can a recurrence of the past social practices of routinely isolating handicapped persons in massive institutions be prevented.

ARGUMENT

I.

BALANCING THE STATE'S DECREASING INTEREST IN INVOLUNTARY HOSPITALIZATION WITH THE INDIVIDUAL'S FUNDAMENTAL INTEREST IN LIBERTY REQUIRES A STANDARD OF PROOF GREATER THAN A MERE PREPONDERANCE OF THE EVIDENCE.

Due process is not a fixed concept; its requirements vary depending on the various interests involved in a given situation. Due process commands a balancing approach which weighs the relative importance of competing interests.

> [D]ue process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Morrissey v. *Brewer,* 408 U.S. 471, 481 (1972) (citations omitted).

The standard of proof dictated by procedural due process will reflect the comparison of the interests of the individual with the interests of the state. In civil commitment proceedings the individual's interest is a fundamental interest in liberty. The state's interest asserts the parens patriae rationale of protecting mentally ill individuals and the police power rationale of protecting society. In recent years, the state's interest in civil commitment has been decreasing,

while the individual's liberty interest, in a variety of contexts, has been increasingly strengthened by the judiciary through due process restrictions upon state-sponsored deprivations of liberty.

A. The State's Interest in Involuntary Hospitalization Has Decreased Over the Past Two Decades.

1. *The State's Interest in Involuntary Hospitalization Developed Historically Because of the Lack of Alternatives to Institutional Care.* The sources of the state's power to commit mentally ill individuals derive from our Anglo-American political system.[1] The state's power is exercised under the parens patriae power to protect the individual and under the police power to protect the public. For centuries, mentally ill persons were not treated as members of a distinct class; rather, if nonviolent and indigent, they were lumped with other paupers who received "protective" treatment under parens patriae notions and, if violent, they were processed as criminals under the police power.[2]

Prior to the mid-nineteenth century, mentally ill individuals experienced social treatment which included being: exorcised to drive out evil spirits, hung as witches, chained in cages and kennels with regular whippings, auctioned off as paupers, and incarcerated in prisons and almhouses.[3] Beginning in about 1830, the general belief in the incurability of mental illness shifted to an optimistic

[1] Kittrie, The Right to Be Different 58 (7971) (hereinafter cited as Kittrie).

[2] *Id.* at 62.

[3] Deutsch, The Mentally Ill in America 517 (1949) (hereinafter cited as Deutsch).

view of the curability of all mentally ill persons.[4] In the 1840's and the 1850's, the crusading work of Dorothea Dix to improve conditions for mentally ill persons in poorhouses combined with the new focus on curability to generate the first large-scale establishment of institutions specifically designed and operated for the treatment of mentally ill individuals.[5]

These new approaches joined with other contemporary social and economic developments—ranging from the industrial revolution through the altered and increased complexities of social order and relationships to the rapid expansion of population and urbanization—to produce the solution for the problem of mental illness. That solution was to gather all mentally ill people together and confine them in institutions, isolated from society in rural areas.[6]

With the rapid construction of mental hospitals came the need for involuntary commitment procedures. As civil commitment laws were legislatively adopted during the mid-nineteenth century, they initially sought to protect only the societal concerns. These statutes constructed very informal procedures designed to favor administrative ease, and they were almost void of concern for the individual's personal rights.[7]

[4] *Id.* at 132; Rock, Jacobson & Janopaul, Hospitalization and Discharge of the Mentally Ill 12 (1968) (hereinafter cited as Rock, Jacobson & Janopaul).

[5] Deutsch, *supra* note 3, at 159. The institutional model grew out of the framework of workhouses and public hospitals. Kittrie, *supra* note 1, at 61.

[6] Deutsch, *supra* note 3, at 186-87.

[7] Curran, *Hospitalization of the Mentally Ill,* 31 N. Car. L. Rev. 274, 275 (1953) (hereinafter cited as Curran); Rock Jacobson & Janopaul, *supra* note 4, at 14-16. Interestingly, the early procedural rules existed not to prevent improper commitment but to keep out paupers and vagabonds who might desire the perceived benefits of the institution. Kittrie, *supra* note 1, at 64.

In the 1860's Dorothy Packard started a crusade to arouse public concern and eliminate the "railroading" of individuals into asylums after her release from an Illinois mental hospital.[8] Her exposures resulted in many states introducing formal guarantees of minimal due process in the involuntary commitment process.[9]

However, by the last quarter of the nineteenth century, the failure of mental hospitals to "cure" a significant portion of their mental patients caused public disillusionment and a period of reaction, spurring a new cycle of institutional neglect.[10] Institutions grew larger and focused mainly on custody rather than treatment; the Depression of the 1930's and the Second World War exacerbated the problems.[11]

This approach continued undaunted until the past two decades. For approximately one hundred years many doctors prescribed hospitalization as "the only acceptable form of treatment for the mentally ill."[12]

Until the mid-1950's, institutionalization was viewed as the only available means of insuring the state's interest of protecting society. However, with the more recent availability of alternatives which entail fewer restrictions upon individual liberty, the state's interest in involuntary confinement to an institutional environment has decreased concomitantly.

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[8] Kittrie, *supra* note 1, at 65; Curran, *supra* note 7, at 275-76.

[9] Kittrie, *supra* note 1, at 65.

[10] Deutsch, *supra* note 3, at 157.

[11] *Id.* at 446-50.

[12] Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1107, 1112 (1972) (hereinafter cited as Chambers).

2. ***The Development of Community-Based Residential and Treatment Services Has Significantly Reduced the State's Reliance upon Involuntary Hospitalization.*** The last two decades have witnessed a significant decrease in the resident population of public mental hospitals.[13] The ill-fated development of mental institutions was

> a movement begun by Dorothea Dix that started as the hope of the future for the mentally disturbed, and is now ending with hopes shattered and expectations unmet, under the aegis of judicial scrutiny, and with public outcry. The mental hospital, as an institution, is under fire, not for what it has done for the mentally disturbed and ill but what it has not done.[14]

In 1955, the demise of institutionalization as the primary response to societal concerns began with the establishment by Congress of a commission to study the existing mental health programs and facilities in the United States.[15] The commission's report, issued in 1961, urged the rapid development of outpatient clinics and services and a decreased emphasis on inpatient mental hospitals.[16] The late President Kennedy responded by calling for decreasing

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[13] After peaking in 1955 with 559,000 persons institutionalized for mental illness, the numbers decreased to 504,600 in 1963 and to 215,500 in 1974. Comptroller General of the United States, Report to the Congress—Returning the Mentally Disabled to the Community: Government Needs to Do More 8 (1977) (hereinafter cited as Comptroller General Report).

[14] Ahmed & Plog, *Introduction and An Overview of the Closing Scene*, in State Mental Hospitals: What Happens When They Close 3 (Ahmed & Plog, eds. 1976).

[15] The Mental Health Study Act of 1955, ch. 417, § 3, 69 Stat. 382, cited in Chambers, *supra* note 12, at 1114.

[16] Joint Commission on Mental Illness and Health, Action for Mental Health (1961), cited in Chambers, *supra* note 12, at 1115.

by one half the population of mental hospitals; Congress passed the Community Mental Health Centers Construction Act of 1963, 42 U.S.C. § 2689, committing substantial federal funds for the creation of community-based treatment facilities by the states.[17]

The 1950's also marked the development of tranquilizing medication which enabled many patients, who previously had been hospitalized, to be treated in the community.[18] Studies comparing hospital-based treatment to community-based treatment made striking conclusions.

> The hospital as a form of treatment for the severely ill psychiatric patient is always expensive and inefficient, frequently anti-therapeutic, and never the treatment of choice.
>
> There are many studies in the psychiatric literature of the last two decades which report that forms of treatment other than hospitalization are superior in terms of outcome for the severely ill psychiatric patient. . . . In terms of the patients' posttreatment function, need for further treatment, and improvement in symptoms, patients who were not hospitalized always did better than matched patients who were treated in hospitals.[19]

Amicus recognizes that the relative value of community-based alternatives to institutional confinement is not at issue in the case at Bar. However, *amicus* asserts that the existence of widespread community-based alternatives, together with the support given such alternatives by count-

[17] Comptroller General Report, *supra* note 13, at 3.

[18] Chambers, *supra* note 12, at 1117.

[19] Mendel, *The Case for Closing of the Hospitals,* in State Mental Hospitals: What Happens When They Close 21 (Ahmed & Plog eds. 1976).

less mental health professionals and by the federal and state governments, illustrates the reduced reliance currently placed upon the involuntary commitment process. Merely summarizing the existing federal programs highlights the community services available to those mentally ill persons whom the state believes may need care or treatment.

There are at least 135 federal programs, of which 89 are operated by the Department of Health, Education and Welfare, which serve the mentally disabled either directly or indirectly and which fund services for such individuals.[20] In 1963, the Community Mental Health Centers program sought to insure that, whenever possible, mentally ill persons be treated in their own communities.[21] Although this program has accomplished much, in 1974 the Comptroller General reported that the Act's goals had not been effectively achieved.[22] In order to more effectively carry out its original intent, Congress responded by enacting the Special Health Revenue Sharing Act of 1975, 42 U.S.C. § 246,[23]

[20] Comptroller General Report, *supra* note 13, at 5.

[21] See discussion, *supra* note 17 and accompanying text. Several courts have required states to provide appropriate community-based services to eliminate inappropriate hospitalization. *See e.g. J.L. & J.R.* v. *Parham,* 412 F. Supp. 112 (M.D. Ga. 1976), *prob. juris. noted,* 45 U.S.L.W. 3373 (1977), *reargument ordered,* 46 U.S.L.W. 3452 (1978); *Dixon* v. *Weinberger,* 405 F. Supp. 974 (D.D.C. 1975).

[22] Comptroller General Report, *supra* note 13, at 67.

[23] Under this Act, states must establish and implement a plan to eliminate inappropriate institutional placements and to insure the availability of appropriate noninstitutional services. 42 U.S.C. § 246(d)(2)(D)(i)(I).

and the Community Mental Health Centers Amendments of 1975, 42 U.S.C. § 2689.[24]

As of July, 1975, $1.2 billion had been awarded by the National Institute for Mental Health for the construction and staffing of 603 community mental health centers which, when operational, will serve 41 percent of the nation's population.[25] Other federal services which impact upon the availability of community care include Medicaid, Medicare, Supplemental Security Income, Vocational Rehabilitation,[26] Housing Assistance,[27] and Social Services.[28] In addition, a large number of mental health clinics have been established by state and local governments and by private organizations to provide such services as day treatment, medication and psychiatric therapy.[29]

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[24] These amendments include the requirements that the community mental health centers provide transitional halfway house services, 42 U.S.C. § 2689(b)(1)(G), and mental health center treatment, 42 U.S.C. § 2689(b)(1)(A), as alternatives to inhospital treatment.

[25] Comptroller General Report, *supra* note 13, at 68.

[26] The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., is aimed particularly at efforts to rehabilitate those with severe disabilities.

[27] The Housing and Community Development Act of 1974 requires the consideration of low income, mentally disabled persons in the Department of Housing and Urban Development's housing assistance plans. 42 U.S.C. § 1437a (2).

[28] Under Title XX of the Social Security Act, 42 U.S.C. § 1397, states receive federal funds to provide services aimed at five specific goals, two of which are related to deinstitutionalization. 42 U.S.C. § 1397(1)-(5). For this program, $2.5 billion is available annually to the states. 42 U.S.C. § 1397a (a)(2)(A).

[29] Comptroller General Report, *supra* note 13, at 67.

This array of community-based services bears upon the balancing of interests required to determine the standard of proof which due process mandates in the involuntary commitment process. Twenty years ago, if the state failed in its attempt to involuntarily commit an individual because it could not meet the requisite standard of proof, the individual would have been virtually without community support services. If the state's interest in protecting the individual or society was valid, that interest could have suffered. However, the numerous support services which currently exist in the community operate to minimize any risk that the state's interests will not be fulfilled. The wide availability of community services clearly diminishes the state's interest in civil commitment.

Finally, the increased utilization of voluntary admissions also has influenced the decline in the need for involuntary hospitalization. The persuasive force of family, friends and community service providers has combined with a heightened awareness among mentally ill individuals as to the availability of mental health services to minimize the need for state intervention. By 1972, "it was clear that the pendulum had swung such that voluntary admissions had come to outnumber involuntary, and that swing seems to be continuing."[30] The treatment pattern, with its attendant increase in voluntary care, reduces the risk to the state and consequently decreases the state's interest in involuntary commitment.

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[30] Stone, Mental Health and Law: A System in Transition 43 (1975) (published by the National Institute of Mental Health) (hereinafter cited as Stone). "Current reports suggested that involuntary civil commitment is rapidly declining." *Id.*

B. Involuntary Civil Commitment Seriously Abridges an Individual's Fundamental Interest in Liberty.

1. *The Court Has Previously Recognized the Deprivation of Liberty Which Occurs as a Result of the Commitment Process.* While the Court has never directly ruled on the substantive or procedural requirements which are constitutionally mandated in the civil commitment process, the Court has recognized, in a series of decisions, that the involuntary commitment of an individual involves a serious deprivation of liberty.

In the most recent decision involving an involuntarily committed mental patient, the Court narrowed the issue to an "important question concerning every man's constitutional right to liberty." *O'Connor* v. *Donaldson,* 422 U.S. 563, 573 (1975). The Court held that

> a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.

Id. at 576. In his concurring opinion, Chief Justice Burger emphasized the overriding interest in liberty held by a mentally ill individual who is nondangerous and capable of surviving safely in freedom. *Id.* at 578 (Burger C.J., concurring).[31]

[31] "There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." 422 U.S. at 580 (Burger C.J., concurring). *See also* Chambers, *supra* note 12, at 1158. "It is indeed hard to accept that there can be any 'fundamental personal liberty' . . . more fundamental than personal liberty itself and personal liberty is, of course, what is at risk in its most literal sense for the mentally ill." Among the fundamental interests which Chambers argues are affected by civil commitment are the rights to travel, of free association, to peaceably assemble, to communicate and receive communications, to exercise religious beliefs and to maintain one's privacy, though overriding is the right not to be physically confined.

"Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on [the] power [to involuntarily hospitalize] have not been more frequently litigated." *Jackson* v. *Indiana,* 406 U.S. 715, 737 (1972). In the case at Bar, the Court is asked to decide the requisite standard of proof which the state must meet in order to justify "a massive curtailment of liberty." *Humphrey* v. *Cady,* 405 U.S. 504, 509 (1972).

At stake is an individual's liberty, "an interest of transcending value." *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958). *Amicus* argues that the preservation of that liberty interest requires that a substantial standard of proof be met prior to ordering involuntary hospitalization. A standard which permits commitment upon a mere showing of preponderance of the evidence does not afford sufficient due process protection to the individual's liberty interest.

2. *The Liberty Interest in Civil Commitment Is at Least as Important as the Liberty Interest in Juvenile and "Mentally Disordered Sexual Offender" Cases in Which the Reasonable Doubt Standard Has Been Required.* Judicial proceedings against juveniles historically provided informal standards and procedures, based upon the rationale that the proceedings were civil in nature and based upon an assumed benevolent intent to rehabilitate wayward youth. In numerous respects, the former policies of administration of juvenile justice parallel the current civil commitment practices in many states.

In 1967, the Court looked beyond the asserted reasoning to analyze the effect of the juvenile process upon the individual.

> Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct.

> The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence and limited practical meaning that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours. . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

In re Gault, 387 U.S. 1, 27 (1967) (footnotes omitted).

Rather than relying upon the labels attached to the procedures, the Court struck to the heart of the matter: commitment means depriving a person of his or her liberty. The Court applied the basic principles of due process to juvenile proceedings, reasoning that

> [t]o hold otherwise would be to disregard substance because of the feeble enticement of the civil label of convenience which has been attached to juvenile proceedings. . . . For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil."

Id. at 49-50.

Three years after *Gault,* the Court considered whether the "essentials of due process and fair treatment" require a reasonable doubt standard of proof in juvenile proceedings. *In re Winship,* 397 U.S. 358, 359 (1970). The Court recognized that the standard of proof is the prime instrument for reducing the risk of convictions based upon factual error and that the juvenile's interests in

avoiding loss of liberty and stigmatization are of immense importance. Drawing upon its earlier reasoning in *Speiser* v. *Randall,* 357 U.S. 513, 525-26 (1958), the *Winship* Court held:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.
>
> . . . .
>
> [U]se of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

397 U.S. at 364.

The lower court had set forth three grounds for not applying the reasonable doubt standard: the process did not result in "convictions;" the adjudication affected no rights or privileges, such as the right to hold public office or obtain a license; and, a cloak of protective confidentiality encompassed all the proceedings. *Id.* at 365. In rejecting this reasoning and applying the reasonable doubt standard, the *Winship* Court referred to *Gault*: "We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." *Id.* at 365-66.

The *Winship* Court reasoned that the benevolence of the process would not be affected by the application of a strict standard of proof. The reasonable doubt standard was seen as a vehicle to ensure that the benevolent purposes were applied only to those individuals who had actually behaved in a manner warranting governmental intrusion into their lives.[32]

Justice Harlan, concurring in the Court's opinion in *Winship,* performed a careful analysis of the comparative social costs of erroneous factual determinations. He viewed the standard of proof as instructing the factfinder on the necessary degree of confidence in the correctness of the factual conclusions. He also understood that the standard of proof reflects a societal judgment as to the acceptable tolerance of frequency of error.

> In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.
>
> . . . .
>
> In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as

[32] In the civil commitment process, this argument may be even more compelling.

> Given the record of past performance with the tragic parody of legal commitment used to warehouse American citizens, it is equally important that the individual feel sure that the mental health system cannot be so used and abused. Indeed, it may be more important for while the average citizen may have some confidence that if called by the Grand Inquisitor in the middle of the night and charged with a given robbery, he may have an alibi or be able to prove his innocence, he may be far less certain of his capacity, under the press of fear, to instantly prove his sanity. Stone, *supra* note 30, at 57.

> equivalent to the disutility of acquitting someone who is guilty.

Id. at 371-72 (Harlan J., concurring).[33]

While not deciding a standard of proof issue, the Court has addressed issues involving the involuntary commitment of sexual offenders for treatment under statutes which were traditionally labelled "civil." *Specht* v. *Patterson,* 386 U.S. 605 (1967). "These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause." *Id.* at 608. The Court held that full due process must attach in proceedings to determine whether a person constitutes a threat of causing bodily harm to the public or whether a person is an habitual offender and mentally ill. *Id.* at 611.

The United States Court of Appeals for the Seventh Circuit relied upon *Specht* and *Winship* in holding that in-

[33] In *Murel* v. *Baltimore City Criminal Courts,* 407 U.S. 355 (1972), the Court dismissed as improvidently granted a writ of certiorari to the Court of Appeals for the Fourth Circuit. The lower court had upheld a preponderance of the evidence standard for the commitment of "defective delinquents" in *Tippett* v. *Maryland,* 436 F.2d 1153 (4th Cir. 1971). The Court dismissed the writ because Maryland was in the process of rewriting its commitment statutes. Justice Douglas dissented, focusing upon the liberty interests involved.

> When a state moves to deprive an individual of his liberty, incarcerate him indefinitely, or to place him behind bars for what may be the rest of his life, the Federal Constitution requires that it meet a more rigorous burden of proof than that employed by Maryland to commit defective delinquents. . . . Petitioners have thus been taken from their families and deprived of their constitutionally protected liberty under the same standard of proof applicable to run-of-the-mill automobile negligence actions.

Id. at 359 (Douglas J., dissenting).

voluntary commitments under the Illinois Sexually Dangerous Persons Act must apply a reasonable doubt standard. *United States ex rel. Stachulak* v. *Coughlin,* 520 F.2d 931 (7th Cir. 1975). Inherent in the Seventh Circuit's decision is the recognition that the commitment of sexually dangerous persons can involve even greater deprivations of liberty than juvenile commitments. The sentence imposed under Illinois' commitment law was indeterminate, while a juvenile was only institutionalized until age eighteen.[34]

In the case at Bar, the Texas commitment procedure similarly provides for an indeterminate sentence; thus, the deprivation of liberty is potentially more serious than that faced in juvenile proceedings.[35] The Texas civil commitment statute, which merely requires the state to prove its case by a preponderance of the evidence, rejects this Court's prior reasoning.

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[34] In *People* v. *Burnick,* 535 P.2d 352 (Cal. 1975), the California Supreme Court required the application of a reasonable doubt standard in mentally disordered sexual offender cases. "[S]o drastic an impairment of the liberty and reputation of an individual must be justified by proof beyond a reasonable doubt." *Id.* at 354. *See also People* v. *Pembrock,* 62 Ill. 2d 317, 342 N.E.2d 28 (1976); *In re Andrews,* 334 N.E.2d 15 (Mass. Sup. Jud. Ct. 1975).

[35] [A] former mental patient may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more severe consequences than do the formally imposed disabilities. Many people have an "irrational fear of the mentally ill." The former mental patient is likely to be treated with distrust and even loathing; he may be socially ostracized and victimized by employment and educational discrimination. . . .

The legal and social consequences of commitment constitute the stigma of mental illness, a stigma that could be as socially debilitating as that of a criminal conviction.

Note, *Developments in the Law—Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190, 1200-01 (1974) (hereinafter cited as Developments in the Law).

3. The Liberty Interest Threatened by Civil Commitment Merits, at a Minimum, the Same Protections Established by the Court in Other Civil Matters Which Require a Standard of Clear and Convincing Evidence. The Court has considered the standard of proof issue in a series of cases concerning United States citizenship and the right to reside in this country. In a 1943 denaturalization case, the Court recognized that requiring proof to meet only a preponderance of the evidence standard leaves too much doubt in the question of whether an individual's citizenship should be revoked. *Schneiderman* v. *United States,* 320 U.S. 118 (1943). Weighing the importance of citizenship to the individual, the Court reasoned that "such a right once conferred should not be taken away without the clearest sort of justification and proof." *Id.* at 122. Thus, the Court imposed a burden of proof which can only be met by "clear, unequivocal and convincing" evidence. *Id.* at 125.

This holding was subsequently expanded to cases involving deportation proceedings. *Woodby* v. *Immigration Service,* 385 U.S. 276 (1966). Recognizing that the degree of proof required "is the kind of question which has traditionally been left to the judiciary to resolve," the Court considered the interests of individuals subject to deportation procedures. *Id.* at 284. While such persons were not facing criminal prosecutions, they were facing the serious deprivation of expulsion from the United States. The Court adopted a standard of clear, unequivocal and convincing evidence,[36] noting that this "standard of proof is no

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[36] The Court has subsequently reiterated this holding in other denaturalization cases. *Chaunt* v. *United States,* 364 U.S. 350 (1960); *Nishikawa* v. *Dulles,* 356 U.S. 129 (1958). In *Chaunt,* the Court reasoned that the grave ramifications to a person's liberty require that naturalization decrees not be lightly set aside. "Clear, unequivocal, and convincing evidence" must be presented which does not leave "the issue in doubt." 364 U.S. at 353.

stranger to the civil law." *Id.* at 285. The Court found that this standard (and even higher standards) had been applied in numerous civil cases involving issues such as civil fraud, adultery, illegitimacy, lost wills and oral contracts to make bequests. With such cases as a counterpoint, the Court reasoned: "[I]t does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case." *Id.*

Finally, in a case involving First Amendment interests, a plurality of the Court held that an extraordinary standard of proof is required in defamation actions. *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971). Reasoning that "[i]n libel cases . . . we view an erroneous verdict for the plaintiff as most serious," the Court held that the plaintiff's case must meet a standard of clear and convincing evidence. *Id.* at 50.

This Court, and others, have found a number of diverse interests which cannot be infringed upon by a mere showing of preponderance of the evidence. *Amicus* argues that an individual's interest in liberty is of sufficient import that indefinite civil commitment should not occur unless a higher degree of certainty is shown. Sufficient protection against wrongful commitments cannot be assured unless a more stringent standard of proof is required.

C. The Overwhelming Weight of Authority Favors a Standard of Proof in Civil Commitment Proceedings Which Is More Stringent Than Preponderance of the Evidence.

Numerous federal and state courts have ruled on the question of the appropriate standard of proof in civil commitment hearings. These courts have overwhelmingly rejected preponderance of the evidence, finding this common

"civil" standard to be constitutionally insufficient;[37] however, these courts have differed as to whether the evidence must meet a standard of beyond a reasonable doubt[38] or one of clear and convincing evidence. [39]

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[37] It is clear that the overwhelming trend of the courts considering the standard of proof in civil commitment proceedings . . . is to focus their debate on which of the more stringent standards—proof beyond a reasonable doubt or proof by clear and convincing evidence—is the appropriate one.

Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings,* 1977 Det. Coll. L. Rev. 209, 217 (1977) (hereinafter cited as Share).

[38] Those cases mandating a reasonable doubt standard include: *In re Ballay,* 482 F.2d 648 (D.C. Cir. 1973); *Suzuki* v. *Alba,* 438 F. Supp. 1106 (D. Haw. 1977); *Suzuki* v. *Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976); *Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976); *Proctor* v. *Butler,* 380 A.2d 673 (N.H. 1977); *State* v. *O'Neill,* 545 P.2d 97 (Ore. 1976); *In re Hodges,* 325 A.2d 605 (D.C. App. 1974); *Denton* v. *Commonwealth,* 383 S.W.2d 681 (Ky. Ct. App. 1964).

[39] Those cases mandating a standard of clear and convincing evidence include: *French* v. *Blackburn,* 428 F. Supp. 1351 (M.D.N.C. 1977); *Stamus* v. *Leonhardt,* 414 F. Supp. 439 (S.D. Ia. 1976); *Doremus* v. *Farrell,* 407 F. Supp. 509 (D. Neb. 1975); *Bartley* v. *Kremens,* 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded,* 431 U.S. 119 (1977), *redecided, Institutionalized Juveniles* v. *Secretary of Public Welfare,* No. 72-2272 (E.D. Pa. May 25, 1978), *prob. juris. noted,* ..... U.S. ..... (1978); *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *Dixon* v. *Attorney General of Commonwealth of Pa.,* 325 F. Supp. 966 (M.D. Pa. 1971); *In re Beverly,* 342 So. 2d 481 (Fla. 1977); *Matter of Valdez,* 88 N.M. 338, 540 P.2d 818 (1975); *Matter of Ward,* 533 P.2d 896 (Utah 1975); *State ex rel. Hawks* v. *Lazaro,* 202 S.E.2d 109 (W. Va. 1974); *In re Levias,* 83 Wash. 2d 253, 517 P.2d 588 (1973) (but construes standard to be civil equivalent of criminal law reasonable doubt standard); *Commonwealth ex rel. Finken* v. *Roop,* 339 A.2d 764 (Pa. Super. 1975); *People* v. *Sansone,* 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974).

Repeatedly, the courts have rejected the preponderance of the evidence standard because of the individual's overriding interest in liberty and because the doctrine of parens patriae is not deemed a sufficient justification for utilizing the less stringent standard.[40] Additionally, the stigma attached to involuntary commitment is a factor relied upon by the courts in rejecting the preponderance standard.[41] The Court's decisions in *Gault, Winship,* and *Woodby* are consistently cited as requiring this result.

The United States Court of Appeals for the District of Columbia carefully analyzed the competing interests in the civil commitment process before concluding that a reason-

[40] *E.g., In re Ballay,* 482 F.2d 648 (D.C. Cir. 1973); *Stamus* v. *Leonhardt,* 414 F. Supp. 439 (S.D. Ia. 1976); *Suzuki* v. *Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976); *Doremus* v. *Farrell,* 407 F. Supp. 509 (D. Neb. 1975); *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976); *Dixon* v. *Attorney General of Commonwealth of Pa.,* 325 F. Supp. 966 (M.D. Pa. 1971); *Proctor* v. *Butler,* 380 A.2d 673 (N.H. 1977); *Matter of Valdez,* 88 N.M. 338, 540 P.2d 818 (1975); *In re Levias,* 83 Wash. 2d 253, 517 P.2d 588 (1973); *In re Hodges,* 325 A.2d 605 (D.C. App. 1974); *People* v. *Sansone,* 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974).

[41] *E.g., In re Ballay,* 482 F.2d 648 (D.C. Cir. 1973); *Doremus* v. *Farrell,* 407 F. Supp. 509 (D. Neb. 1975); *Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976); *Proctor* v. *Butler,* 380 A.2d 673 (N.H. 1977). For a discussion of the stigma resulting from former hospitalization, see note 35, *supra.*

able doubt standard is constitutionally required. *In re Ballay,* 482 F.2d 648 (D.C. Cir. 1973). The Court resolved the question within the framework constructed by *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), involving the revocation of parole. There, the two questions addressed by the Supreme Court were: first, whether to apply due process; and, if it were to be applied, what process was due.

Likewise, the *Ballay* court first questioned whether due process should attach in a civil commitment.

> There can no longer be any doubt that the nature of the interests involved when a person sought to be involuntarily committed faces an indeterminate and, consequently, potentially permanent loss of liberty and privacy accompanied by the loss of substantial civil rights . . . is "one within the contemplation of the 'liberty and property' language of the Fourteenth Amendment."

482 F.2d at 655 (citations omitted).

The *Ballay* court then sought to determine the standard of proof required by due process in civil commitment proceedings. The court proceeded by comparing the liberty interests in involuntary commitment with the conditional liberty interest of a parolee. The court reasoned that because a parolee had already been convicted of a crime, the state's interest in institutionalizing him or her was clearly greater than its interest in institutionalizing a mentally ill person, as to whom a threshold deprivation of liberty would occur. From the perspective of the individual, it was reasoned that the mentally ill person has a more substantial expectation of liberty than does the parolee, whose liberty is merely conditional and subject to the limitations of the parole.

While the state's interest in incarcerating criminals includes notions of deterrence, rehabilitation, physical removal from society, and retribution, the *Ballay* court found the state's interest in civil commitment to rest only upon the need to physically remove an individual from society and upon the desire to provide rehabilitation or treatment. Because a criminal can only be physically removed after being convicted of a crime, the court reasoned that the state's interest in physically removing a mentally ill person from society could likewise only be based upon the same standard of proof utilized in criminal proceedings. The *Ballay* court logically concluded that the only justification for a lesser standard of proof could be the state's desire to provide rehabilitation or treatment for the individual.

It is this very rationale which the Texas Supreme Court asserts as support for its decision in the case at Bar. In applying a preponderance standard, the lower court held that the provision of treatment, together with the availability of periodic review and the potential for release when an individual is no longer dangerous, justifies the lesser standard.[42] The *Ballay* court persuasively rebuts this argument. While acknowledging the validity of the state's purpose in treating mentally ill individuals, the *Ballay* court held that the standard of proof must operate to ensure that only those who need treatment are committed. "Recognizing again the immense individual interests involved, it is questionable whether a rather significant margin of error should be tolerated regardless of the rationale." 482 F.2d at 650.

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[42] *See also People* v. *Sansone,* 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974), relying upon full due process protections including, the provision of treatment and periodic review, to justify a clear and convincing standard, rather than a reasonable doubt standard.

Although the Supreme Court has not had occasion to directly address this issue, Chief Justice Burger's concurring opinion in *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975), parallels the reasoning in *Ballay.* In *Donaldson,* the United States Court of Appeals for the Fifth Circuit had applied a quid pro quo theory in upholding the right to treatment for involuntarily committed mental patients. *Donaldson* v. *O'Connor,* 493 F.2d 507, 522-27 (5th Cir. 1974), *vacated and remanded,* 422 U.S. 563 (1975). The Supreme Court indicated concern that such a holding might permit a state to involuntarily hospitalize a mentally ill person upon the mere showing that treatment was contemplated. 422 U.S. 572-73. Justice Burger scrutinized this implication which "raises the gravest of constitutional problems" and which must be "candidly appraised." *Id.* at 585-86 (Burger C.J., concurring).

> Rather than inquiring whether strict standards of proof or periodic redetermination of a patient's condition are required in civil confinement, the theory accepts the absence of such safeguards . . . [T]hat prospect is especially troubling in this area.

Id. at 587.

The previous decisions of this Court concerning the standard of proof in liberty deprivation cases, buttressed by the holdings of lower courts in civil commitment cases, require that the preponderance of the evidence standard be declared a violation of due process.

II.

THE INEXACT NATURE OF THE PSYCHIATRIC TESTIMONY RELIED UPON IN CIVIL COMMITMENT PROCEEDINGS SUPPORTS THE NEED FOR THE EVIDENCE TO MEET A REASONABLE DOUBT STANDARD.

The standard of proof to be met in a civil commitment proceeding can be translated into the degree of statistical probability which must be shown. Under this theoretical construct, the preponderance of the evidence, clear and convincing evidence and reasonable doubt standards would respectively require degrees of probability of 51 percent, 75 percent and 90 percent.[43] The standard of proof issue essentially raises two questions: what degree of probability justifies the curtailment of liberty through civil commitment; and, what degree of probability is realistically achievable. *Amicus* contends that the present state of psychiatric knowledge is insufficient to obtain either 75 percent or 90 percent accuracy in diagnosis or in the prediction of future dangerous behavior. Yet, the primary rationale suggested by the courts for having rejected the reasonable doubt standard and adopting the clear and convincing standard is the impossibility of meeting the higher standard.[44]

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[43] Stone, *supra* note 30, at 56.

[44] *E.g., Doremus* v. *Farrell,* 407 F. Supp. 509 (D. Neb. 1975); *Bartley* v. *Kremens,* 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded,* 431 U.S. 119 (1977), *redecided, Institutionalized Juveniles* v. *Secretary of Public Welfare,* No. 72-2272 (E.D. Pa. May 25, 1978), *prob. juris. noted,* ..... U.S. ..... (1978); *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *In re Beverly,* 342 So. 2d 481 (Fla. 1977); *Matter of Valdez,* 88 N.M. 338, 540 P.2d 818 (1975); *State ex rel. Hawks* v. *Lazaro,* 202 S.E.2d 109 (W. Va. 1974); *People* v. *Sansone,* 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974). In *Lynch,* the court viewed the clear and convincing standard as "having the highest degree of certitude reasonably attainable in view of the nature of the matter at issue." 386 F. Supp. at 393.

Amicus argues that the focus of the civil commitment hearing must be shifted to the determination of objective, provable facts—*i.e.,* facets of behavior and overt acts of the individual—upon which a judge or jury can reach a rational decision. Once provable factors are utilized, no reason exists not to apply the reasonable doubt standard when substantial deprivations of liberty are sought.

Over a decade ago Chief Justice Burger recognized that psychiatrists and psychologists "may be claiming too much in relation to what they really understand about the human personality and human behavior."[45] Reliance upon their opinions in civil commitment proceedings can lead to dire results—not the least of which is the wrongful incarceration of human beings.

> The mental condition of one whose mind is so deranged as to require imprisonment for his own and others' good is indeed pitiable. But the mental attitude of one who is falsely found insane and relegated to false imprisonment is beyond conception. No greater cruelty can be committed in the name of the law.[46]

The reasonable doubt standard should not be sacrificed in an attempt to uphold unworkable statutes. Rather, due process especially requires a high standard of proof where the facts at issue are subject to large statistical error.

A. Psychiatrists Cannot Reliably Diagnose Individuals for the Purpose of Determining the Need for Care and Treatment.

The psychiatric diagnosis plays a major role in determining the threshold question in a civil commitment — whether the individual is mentally ill. The psychiatric

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[45] Burger, *Psychiatrists, Lawyers, and the Courts,* 28 Fed. Prob. 37 (1964).

[46] 5 Wigmore on Evidence § 1400 (Chadbourn rev. ed. 1974).

evidence also bears heavily upon the determination of whether an individual is in need of care and treatment.

A key component to the legal sufficiency of psychiatric evidence is the degree of reliability which can be obtained in the diagnostic process. Reliability refers to the "probability or frequency of agreement when two or more independent observers answer the same question."[47] The reliability of the diagnosis establishes the degree of consistency among the opinions of psychiatrists concerning a person's condition.

A recent article which reviewed the available literature on the question of psychiatric reliability concluded: "Studies on psychiatric diagnosis highlight psychiatry's lack of precise definitions and the inability of psychiatrists to apply these definitions in a reliable and consistent manner."[48] Similarly, another reviewer of the relevant literature observed: "With regard to reliability of diagnosis, the most common research findings indicate that, on the average, one cannot expect to find agreement in more than about 60% of cases between two psychiatrists."[49]

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[47] Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 Calif. L. Rev. 693, 697 (1974) (hereinafter cited as Ennis & Litwack).

[48] Albers, Pasewark & Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception,* 6 Cap. U. L. Rev. 11, 15 (1976) (hereinafter cited as Albers, Pasewark & Meyer), and studies cited therein.

[49] Ziskin, Coping With Psychiatric and Psychological Testimony 181 (2nd ed. 1975) (hereinafter cited as Ziskin), and studies cited therein. *See also* Beck, Ward, Mendelson, Mock, & Erbaugh, *Reliability of Psychiatric Diagnosis: A Study of Consistency of Clinical Judgments and Ratings,* 119 Am. J. Psychiat. 351 (1962), cited in Ziskin, *supra,* at 183. "Under relatively optimal conditions, the percentage of agreement among psychiatrists was found to be 54%."

A second concept which must be considered in assessing psychiatric testimony is the validity, or the accuracy, of the judgments which are made.[50] Even 100 percent reliability would reflect nothing about the accuracy of the agreement reached between psychiatrists; all of the psychiatrists agreeing could still be in error in their mutually held conclusions. Validity indicates the likelihood that the diagnosis is correct. When reliability only approaches 60 percent, there can only be agreement between two different psychiatrists in barely more than half of the diagnoses made. Where there is disagreement, at least one professional must be wrong, if not both. Thus, the validity of diagnosis is at least as low as the degree of reliability.[51]

The landmark study conducted by Rosenhan is a classic example of the inability of psychiatrists to accurately determine the threshold existence of mental illness.[52] In that study, eight individuals who were not mentally ill gained admittance to mental hospitals as patients. After becoming patients they acted and behaved normally. Once admitted, they were unable to secure releases from the institutions for periods ranging from seven to fifty-two days, with an average incarceration of nineteen days.[53]

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[50] Ennis & Litwack, *supra* note 47, at 697.

[51] Very few studies of the validity of generalized predictions of the need for care and treatment have been made; however, accuracy appears to be very low. Ennis & Litwack, *supra* note 47, at 718-19. If the psychiatrist predicts that an individual needs care and treatment and hospitalization results, there is no accurate way of testing whether the person could have successfully lived outside of the institution.

[52] Rosenhan, *On Being Sane In Insane Places,* 13 Santa Clara Lawyer 379 (1973).

[53] *Id.* at 383-84.

Rosenhan found that after a label or diagnosis had been applied, facts were construed so as to appear consistent with the label and that the continuing diagnoses were based solely upon a small fraction of the individual's total behavior. Although the pseudo-patients observed the institutional staff to be "people who really cared, who were committed and who were uncommonly intelligent,"[54] Rosenhan concluded: "We have known for a long time diagnoses are often not useful or reliable, but we have nevertheless continued to use them. We now know that we cannot distinguish insanity from sanity."[55]

The purpose of psychiatric diagnosis is to establish guidelines for the description and prediction of an indivdual's behavior which will enable the psychiatrist to properly treat the individual. However, the broad finding of a person's need for care and treatment has little reliability or validity because of the uncertainties of diagnosis. As one commentator concluded, there are few, if any, correlations between diagnosis and behavior, "save perhaps in the grossest kind of psychotic behavior."[56]

B. Psychiatrists Cannot Accurately Predict the Future Dangerousness of Individuals.

The inability of the psychiatric profession to accurately diagnose mental illness, together with growing disenchantment with the concept of parens patriae,[57] has contributed to the trend among courts and legislatures of requiring a finding of dangerousness to justify involuntary commitment.[58] However, *amicus* contends that dangerousness is equally difficult to accurately predict.

The initial obstacle to accurate psychiatric predictions of dangerousness lies in the medical-psychiatric model which rests upon the principle that "judging a sick person well is more to be avoided than judging a well person sick."[59] In diagnosing a patient, the risks which a psychiatrist takes are greatly reduced by predicting dangerousness and recommending institutionalization.[60] If the prediction is in error, it will likely never be discovered because the individual is incarcerated; on the other hand, should the psychiatrist err by releasing a dangerous individual, he or she will surely learn of the error if an incident occurs in the community.[61]

Even assuming an inachievably high degree of accuracy in psychiatric predictions of future dangerousness, the results of relying upon such a model are startling.

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[54] *Id.* at 339.

[55] *Id.* at 397.

[56] Frank, *Psychiatric Diagnosis: A Review of Research,* 81 J. Gen. Psychol. 157, 165 (1969).

[57] *E.g.,* cases cited in note 40, *supra.*

[58] Even where a finding of dangerousness is not specifically required, it is usually a key factor in a judicial decision to order commitment. Kumasaka & Gupta, *Lawyers and Psychiatrists in the Court: Issues on Civil Commitment,* XXXII Md. L. Rev. 6, 10-12 (1972).

[59] Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions,* 23 J. Leg. Educ. 24, 46-47 (1970) (hereinafter cited as Dershowitz).

[60] Peterson & Seo, *Bayesian Analysis of Overprediction of Insanity,* 34 Psychol. Rep. 207 (1974).

[61] "The losses [to the psychiatrist] due to errors of prediction are such that psychiatrists will want to overpredict violent behavior. Overprediction is perfectly rational for a risk-averting psychiatrist." *Id.* at 213.

> Assume that one person out of a thousand will kill. Assume that an exceptionally accurate test is created which differentiates with ninety-five percent effectiveness those who will kill from those who will not. If 100,000 people are tested, out of the 100 who would kill, 95 would be isolated. Unfortunately, out of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers. In these circumstances, it is clear that we could not justify incarcerating all 5,090 people.[62]

In reality, however, psychiatrists cannot accurately predict future dangerousness. Study after study has concluded that psychiatrists overpredict dangerousness and have no ability to accurately predict future dangerousness.

> [P]sychiatrists are rather inaccurate predictors; inaccurate in an absolute sense, and even less accurate when compared with other professionals . . . and when compared to actuarial devices, such as prediction or experience tables. Even more significant for legal purposes: it seems that psychiatrists are particularly prone to one type of error—overprediction. In other words, they tend to predict anti-social conduct in many instances where it would not, in fact, occur. Indeed, our research suggests that for every correct psychiatric prediction of violence, there are numerous erroneous predictions.[63]

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[62] Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 75, 84 (1968) (hereinafter cited as Livermore).

[63] Dershowitz, *supra* note 59, at 46. One eminent psychiatrist observed:

> I know of no reports in the scientific literature which are supported by valid clinical experience and statistical evidence that describe psychological or physical signs or symptoms which can be reliably used to discriminate between the potentially dangerous and the harmless individual.

Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa.

(footnote continued)

After his years as a jurist with a deep involvement in legal issues affecting mentally ill individuals, Judge Bazelon has adeptly summarized the need for a reasonable doubt standard in civil commitments.

> Recent studies indicate that the accuracy of predictions of future dangerousness is less—far less, to put it mildly—than the requirement of "beyond a reasonable doubt" which is our legal standard to justify criminal confinement. Indeed, to accept commitments on the basis of present predictions of dangerousness, we must virtually reverse Blackstone's immortal formulation of the presumption of innocence: instead of freeing nine guilty persons to avoid convicting one innocent person, we must confine nine non-dangerous persons to avoid freeing one dangerous person.[64]

(footnote continued)

L. Rev. 439, 444 (1974) (hereinafter cited as Diamond). *See also* Steadman, *Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry*, 1 J. Psychiat. and Law 409, 423-24 (1973).

> The lack of meaningful differentiation and the questionable bases for dangerousness presented in the determinations studied here do lead to serious doubts about the appropriateness of any psychiatric predictions of dangerousness for involuntary mental hospitalization . . . . Our conclusion is exactly that of the Pennsylvania Task Force to revise that state's mental health/retardation law which concluded that ". . . there is insufficient predictive expertise to justify preventive detention . . ." based on predictions of dangerousness in the mentally ill.

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[64] Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 Colum. L. Rev. 897, 899-900 (1975) (hereinafter cited as Bazelon). The logical extention of the query then becomes:

> If in the criminal law, it is better that ten guilty men go free than that one innocent man suffer, how can we say in the civil commitment area that it is better that fifty-four harmless people be incarcerated lest one dangerous man be free?

Livermore, *supra* note 62, at 84.

Further evidence of the unrealiability of psychiatric diagnosis has been garnered as a result of the Court's landmark decision in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966). There, the Court struck down on equal protection grounds a procedure whereby prisoners, upon completion of their penal sentences, were automatically confined for compulsory treatment as dangerous mentally ill persons, without a jury trial or a judicial determination. The Court's decision resulted in the release of large numbers of former prisoners from confinement in maximum security treatment centers where they had been confined because of psychiatric predictions of their dangerousness.[65] All were initially transferred to civil hospitals with no special security measures,[66] and many were subsequently discharged.

An exhaustive follow-up study was conducted on the Baxstrom population. After several years, the results showed that of the 969 Baxstrom patients,[67] 27 percent were then living in the community, nine individuals had subsequently been convicted of crimes (only two had been convicted of felonies), and three percent were incarcerated in correctional facilities or hospitals for the criminally in-

[65] Hunt & Wiley, *Operation Baxstrom After One Year*, 124 Am. J. Psychiat. 974, 977 (1968). "Most of them had been examined at least once—often several times—by experienced psychiatrists from the Department of Mental Hygiene and had been denied transfer on the grounds that they were too disturbed or potentially dangerous."

[66] *Id.* at 975-76. Although numerous officials believed that a large number of patients were too dangerous to be maintained in civil hospitals, only seven proved to be so difficult to manage as to require a transfer to a maximum security hospital within the first year of Operation Baxstrom.

[67] *Id.* at 976. Of this number, 176 patients had been discharged after one year.

sane; the level of dangerous behavior exhibited by this group, the members of which had been uniformly considered dangerous, was surprisingly low.[68]

The Baxstrom studies reaffirm the conclusion that psychiatrists are inaccurate predictors of dangerousness, whose tendency is to overpredict.

> In statistical terms, Operation Baxstrom tells us that psychiatric predictions of dangerous behavior are incredibly inaccurate. In human terms, it tells us that but for a Supreme Court decision, nearly 1,000 human beings would have lived much of their lives behind bars . . . all because a few psychiatrists, in their considered opinion, thought they were dangerous and no one asked for proof.[69]

[68] Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-70*, 129 Am. J. Psychia. 304, 308-09 (1972).

Even the few studies published since Operation Baxstrom which claim that dangerousness can be reliably diagnosed do not present a high degree of predictability. Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers L. Rev. 1084, 1092 (1976) (hereinafter cited as Cocozza & Steadman). In one such study only a false positive rate of 65 percent was achieved; in other words, 35 percent of the predictions of dangerousness were correct, while 65 percent of the predictions of dangerousness were incorrect. Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 Crime & Delinq. 371 (1972) (hereinafter cited as Kozol, Boucher & Garofalo). This study involved 592 criminal offenders during a five year period after their release. These individuals had committed prior dangerous acts, and most of them were former sex offenders—a group for which high predictive results are anticipated.

[69] Ennis, *The Rights of Mental Patients*, in The Rights of Americans 487 (Dorsen ed. 1970).

Subsequent to Operation Baxstrom, Cocozza and Steadman undertook a new study, based upon an amendment to the New York Criminal Procedure Law.[70] The new law mandated a determination of dangerousness for all indicted felony defendants found incompetent to stand trial. The determination was to be made by a judge after considering the opinions of two psychiatrists. Those found dangerous were placed in a Department of Corrections facility; those found non-dangerous were placed in a Department of Mental Hygiene mental hospital. The two institutions were in close physical proximity, and they were operated in similar manners. "Thus, the two study groups were, for all intents and purposes, in the same facility . . . and experienced very similar lengths of hospitalization prior to their release to the community or return to court."[71]

Upon completion of the study of these two incarcerated populations, the researchers concluded: "Our results showed that the patients evaluated as dangerous by the psychiatrists were not more dangerous than those evaluated as nondangerous."[72] In fact, among those individuals from both groups who were later returned to the community, 14 percent of those previously diagnosed as dangerous were subsequently arrested for a violent crime, while 16 percent of those previously diagnosed as not dangerous were subsequently arrested for a violent crime.[73]

Based upon the overwhelming evidence, a Task Force of the American Psychiatric Association has concluded that

[70] Cocozza & Steadman, *supra* note 68, at 1092. The amendment became effective on September 1, 1971.

[71] *Id.* at 1097.

[72] *Id.*

[73] *Id.* at 1098. Viewing their study as producing the "most definite evidence available," the researchers assert: "On the basis of all these indicators, we conclude that the psychiatric predictions of dangerousness were not at all accurate." *Id.*

psychiatrists have no special expertise in predicting future dangerous behavior.

> It has been noted that "dangerousness" is neither a psychiatric nor a medical diagnosis, but involves issues of legal judgment and definition, as well as issues of social policy. Psychiatric expertise in the prediction of "dangerousness" is not established and clinicians should avoid "conclusory" judgments in this regard.[74]

C. The Reasonable Doubt Standard Should Not Be Compromised Because of Inexact Elements of Proof.

Because of the difficulties which psychiatrists encounter in attempting to accurately diagnose mental illness and predict future dangerous behavior, it is constitutionally imperative that a high standard of proof be required. The poor predictive abilities of psychiatrists cannot justify lowering the standard of proof when fundamental personal liberty is at issue. *Amicus* suggests that a more viable solution to the standard of proof issue would be to require that the facts to be proved be of such a nature that the reasonable doubt standard can be realistically met.

Numerous commentators have suggested that, should a civil commitment system exist, its objectives should be jus-

[74] American Psychiatric Association, Clinical Aspects of the Violent Individual, Task Force Report 8, at 33 (1974). The Alcohol, Drug Abuse, and Mental Health Administration of the Department of Health, Education and Welfare has reached a similar conclusion. "Although the psychiatric profession is frequently called upon to predict the potential dangerousness of persons brought before the courts, no scientifically reliable method for predicting dangerous behavior exists." Diamond, *supra* note 63, at 451-52, citing United States Department of Health, Education, and Welfare, *HEW News* (News Release, Aug. 8, 1974).

tified by specific behavior of an individual—*i.e.*, recent overt acts of a dangerous nature.

> [I]f there is to be civil commitment, there is no legitimate basis for civil commitment other than recent overt acts, attempts, or threats of overt acts. Any other bases for commitment necessarily involves judgments and predictions which psychiatrists are unable to make reliably and accurately.[75]

The plea to require overt acts as an element of proof in civil commitment proceedings is especially attractive because the legal process would no longer be incarcerating those individuals as to whom the predictions of dangerousness are the least reliable.

> The difficulty involved in predicting dangerousness is immeasurably increased when the subject has *never actually performed an assaultive act.* . . . No one can predict dangerous behavior in an individual with *no history of dangerous acting out.* [76]

Numerous lower courts have dealt with the demands of due process in civil commitments by requiring proof of a

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[75] Ennis & Litwack, *supra* note 47, at 745 n. 182. *See generally* Developments in the Law, *supra* note 35, at 1301-02.

[76] Kozol, Boucher & Garofalo, *supra* note 68, at 384 (emphasis added). *See also* Rubin, *Prediction of Dangerousness in Mentally Ill Criminals,* 27 Arch. Gen. Psych. 397, 405 (1972); Developments in the Law, *supra* note 35, at 1243-45, and studies cited therein. Judge Bazelon argues that a person who has committed numerous anti-social acts is much more likely to commit another such act than an individual who has generally conformed to societal expectations. Bazelon, *supra* note 64, at 901.

specific overt act.[77] In an analogous situation, the Court rejected a vagueness challenge to a sexual psychopath law because the Minnesota Supreme Court's construction of the statute required the matter to be definitely proved. *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U.S. 270 (1940).[78]

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[77] *Goldy* v. *Beal,* 429 F. Supp. 640 (M.D. Pa. 1976); *Stamus* v. *Leonhardt,* 414 F. Supp. 439 (S.D. Ia. 1976); *Doremus* v. *Farrell,* 407 F. Supp. 509 (D. Neb. 1975); *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *Bell* v. *Wayne County Hospital,* 384 F. Supp. 1085 (E.D. Mich. 1974); *Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976); *Dixon* v. *Attorney General of Commonwealth of Pa.,* 325 F. Supp. 966 (M.D. Pa. 1971). In *Suzuki* v. *Alba,* 438 F. Supp. 1106 (D. Haw. 1977), the Hawaii commitment statute which had been amended as a result of *Suzuki* v. *Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976), was again found to be deficient "because it fails to require the finding of a recent act, attempt or threat of imminent and substantial danger before commitment may occur." 438 F. Supp. at 1110. *But see United States ex rel. Mathew* v. *Nelson,* No. 72 C 2104 (N.D. Ill. April 13, 1978).

[78] The state court's interpretation called for factual evidence of conduct "pointing to probable consequences [which is] as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." 309 U.S. at 274.

In a recent decision requiring a reasonable doubt standard, the New Hampshire Supreme Court reasoned that the inexactitude of psychiatric medicine demands compliance with a reasonable doubt standard in order to protect all members of society in their pursuit of a fundamental interest. *Proctor* v. *Butler,* 380 A.2d 673 (N.H. 1977). The Court concluded that such a standard is workable. "It is not difficult to conceive of circumstances in which evidence of past conduct and mental disability will convince 'beyond a reasonable doubt' of a potentially serious likelihood of dangerousness." *Id.* at 677.

When that which is sought to be proved is actually subject to reliable proof, the reasonable doubt standard must be required. The Texas statute being considered in the case at Bar does not require elements of proof which are susceptible to even reliable speculation.[79] The individual's substantial liberty interest mandates a reasonable doubt standard of proof in civil commitments. This Court should not permit a lower standard to be applied solely because state legislatures have drafted statutes which are vague and not easily susceptible to traditional notions of proof. The standard of proof should not be weakened merely because the evidence is weak.

III.

THE IMPLICATIONS OF THIS COURT'S DECISION WILL BE FAR-REACHING, AFFECTING NOT ONLY MENTALLY ILL PERSONS BUT ALSO OTHER HANDICAPPED INDIVIDUALS BY ESTABLISHING THE EXTENT OF CONSTITUTIONAL CONSTRAINTS REQUIRED IN THE CIVIL COMMITMENT PROCESS.

The standard of proof ordered by this Court will have a lasting effect upon the nature of civil commitment proceedings. The standard of proof applied will influence decisions concerning who is committed, will define the level of

[79] The problem with applying any standard of proof to vague criteria is well addressed by Dr. Stone in his reaction to the *Lessard* decision. "But when we add proof beyond a reasonable doubt as a standard for the vague criteria used in other jurisdictions we have simply multiplied 95 x 0." Stone, *supra* note 30, at 57. *See also Murel* v. *Balt. City Crim. Cts.*, 407 U.S. 355 (1972) (Douglas J., dissenting). "Proving a state of mind is no more difficult than many other issues with which courts and juries grapple each day." *Id.* at 364.

seriousness which should attach to the entire commitment proceeding, and will impact upon the burgeoning movement of handicapped individuals who seek integration into society's mainstream.

A. The Standard of Proof in a Civil Commitment Proceeding Has a Substantial Effect Upon the Ultimate Determination of the Trier of Fact.

As previously discussed, virtually all of the courts considering the issue have held that preponderance of the evidence is an insufficient standard to justify the deprivation of liberty which occurs in involuntary hospitalization.[80] Not yet authoritatively resolved is the question of whether a standard of clear and convincing evidence or one of reasonable doubt should be mandated. In reaching this decision, the Court should consider the confusion surrounding the clear and convincing standard, which has been interpreted differently in various states.[81]

The Texas Supreme Court equates a clear and convincing standard with a restatement of the preponderance of the evidence standard under Texas law. *State* v. *Turner*, 556 S.W.2d 563 (Tex. 1977). On the other hand, the Washington Supreme Court equates the clear and convincing

[80] *See generally* Part I C, *supra*, particularly notes 37-39.

[81] The Supreme Court has never formulated a specific definition of the clear and convincing standard of proof. In *Klapprott* v. *United States*, 335 U.S. 601, 612 (1949), Justice Black equated the standard with the reasonable doubt standard in criminal cases. *Accord Id.* at 617 (Rutledge J., concurring). However, in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 737 (1966), the standard was viewed as more stringent than the preponderance standard but not as stringent as the reasonable doubt standard. For a discussion of the various interpretations, see Share, *supra* note 37, at 238-39.

standard with the reasonable doubt standard required in criminal proceedings.

> [Our] ruling . . . is consistent with the Supreme Court holding in *Winship* in demanding that the state establish its case under a standard of proof which constitutes the civil counterpart of the criminal reasonable doubt standard, to wit: clear, cogent, and convincing evidence. Carrying a much greater and much stricter burden of proof than a mere preponderance of the evidence . . . the clear, cogent, and convincing test applicable in mental illness proceedings exacts the duty that every element essential to proving committable mental illness be demonstrated to a degree essentially corresponding to that necessary for commitment in criminal proceedings.

In re Levias, 83 Wash. 2d 253, 517 P.2d 588, 590 (1973).

The Court has previously rejected the theory that the standard of proof makes little or no difference to the trier of fact. "[W]e reject the Court of Appeals' suggestion that there is, in any event, only a 'tenuous difference' between the reasonable doubt and preponderance standard. The suggestion is singularly unpersuasive." *In re Winship*, 397 U.S. 358, 367 (1970). Legal commentors concur.

> The reasonable doubt standard impresses on the trier of fact the necessity of reaching a subjective state of certitude of the fact in issue; the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.[82]

[82] Dorsen & Rezneck, *In re Gault and the Future of Juvenile Law*, 1 Fam. L. Q. 1, 26-27 (Dec. 1967). *See also Murel* v. *Balt. City Crim. Cts.*, 407 U.S. 355, 358 (1972) (Douglas J., dissenting); Wexler, Scoville, et al., *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 Ariz. L. Rev. 1, 101-17 (1971) (hereinafter cited as Wexler).

The standard of proof will make an important difference—the higher the standard, the greater the protection given to the individual's liberty interests.

B. The Application of a Strict Standard of Proof Will Elevate the Commitment Process to a Level Consonant With the Nature of the Liberty Interests at Stake.

Historically the civil commitment process was conducted informally, with a view toward administrative convenience. The serious loss of liberty to the individual was seen as subordinate to the parens patriae interest of the state. However, an increasing number of courts are now carefully scrutinizing the commitment system. As a result of decisions similar in intent to this Court's pronouncements with regard to the juvenile justice system, increasing doses of due process are being prescribed for the ailing civil commitment process.

Despite the growing number of courts which have ordered strict due process safeguards,[83] an aura continues to surround commitment proceedings which subverts the seriousness of the process.[84] All too frequently, hearings last

[83] *E.g., In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Suzuki* v. *Quisenberry*, 411 F. Supp. 1113 (D. Haw. 1976); *Lessard* v. *Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976).

[84] One graphic illustration is found in *State ex rel. Memmel* v. *Mundy*, No. 441-417 (Cir. Ct. Wis. August 8, 1976), *appealed on other grounds*, 75 Wis. 2d 276, 249 N.W.2d 573 (1977), reported in 1 Mental Dis. L. Rep. 183 (1976). The Milwaukee Circuit Court ordered that a number of persons previously committed be either released or given rehearings because of inadequacies in the original

(footnote continued)

but a few minutes and the testimony of the psychiatrist is accepted without question. "The cursory manner in which commitment proceedings are conducted in many states makes the court merely an acquiescent partner to already formulated psychiatric decisions."[85] Similarly, the courts

(footnote continued)

hearings. The decision affected 827 of 838 applications for commitment heard during the period from January 1, 1975 to April 1, 1976. In a scathing decision aimed at both lawyers and judges, the court stated:

> The record presented by this case is as bleak a picture as has probably ever been presented of justice in Milwaukee County. A massive and systematic deprivation of the constitutional rights of people who are unable to voice their own protests has been accomplished by the cooperation of bench and bar of Milwaukee County. It is unconscionable that lawyers and judges who are trained in the law and who have a special duty to protect the constitutional rights of those who are unable to protect themselves, could participate in such a scheme to bilk citizens of their constitutional rights.
>
> [T]he onus of this debacle lies squarely with the lawyers and judges who operate this greased runway to the County Mental Health Center.

Id.

[85] Albers, Pasewark & Meyer, *supra* note 48, at 32-33, citing: Albers & Pasewark, *Involuntary Hospitalization: Surrender at the Courthouse*, Am. J. Comm. Psych. 288 (1974) (study of 300 consecutive commitment cases revealed the court concurring with the two psychiatric examiners in 295 of the cases; a sample of 21 cases illustrated mean and median hearing times of 9.2 and 8.0 minutes, respectively); Miller & Schwartz, *County Lunacy Commission Hearings: Some Observations of Commitment to a State Mental Hospital*, 14 Social Prob. 26 (1966) (mean time for hearings was 3.8 minutes); Scheff, *The Societal Reaction to Deviance: Ascriptive Elements in the Psychiatric Screening of Mental Patients in a Midwestern State*, 11 Social Prob. 401 (1964) (hearings lasting 9.2 minutes on the average); Wilde, *Decision Making in a Psychiatric Screening Agency*,

(footnote continued)

have been characterized as "all too willing to accept the therapist's mimeographed affidavit stating the conditions have been met, without independently testing the validity of the attestation."[86]

The case at Bar provides this Court with the opportunity to mandate an appropriate level of formality to such hearings, consistent with the seriousness of the issue to be determined. Regardless of the existence of other procedural or substantive deficiencies, a reasonable doubt standard puts the trier of fact on notice that the commitment proceeding involves more significant issues than many routine civil matters. This strict standard would publish a message to society and to state legislatures—civil commitment can no longer be used haphazardly as a convenient tool to remove from society those of us who are deemed to be different, strange or bothersome. Rather, the reasonable doubt standard will infuse the involuntary commitment process with a sense of dignity and seriousness of purpose. Our system of laws permits no other judicial proceeding to be conducted in such a trivial and informal manner when such immense individual interests are at stake.

(footnote continued)

8 J. Health & Soc. Behavior 215 (1968) (hearings lasting 8.3 minutes on the average). *See* also Luby & Morris, *Civil Commitment in a Suburban County: An Investigation by Law Students*, 13 Santa Clara Lawyer 518 (1973); Wexler, *supra* note 82, at 38-42; Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 Tex. L. Rev. 424 (1966).

In recent periodic review hearings for recommitment of mentally retarded persons in West Virginia, 198 hearings were held at Colin Anderson Training Center within two days, with each hearing lasting no more than three to five minutes and resulting in 196 individuals being recommitted involuntarily. Sunday Gazette Mail, Charleston, West Virginia, page 1E (May 7, 1978).

[86] Kittrie, *supra* note 1, at 370.

C. Unless a Strict Standard of Proof is Required, Numerous Other Classes of Handicapped Persons, Who Have Only Recently Defeated the Social Impulse Toward Institutionalization and Redirected Public Concern Toward Community Care and Integration, Will Once Again Be Threatened With Involuntary Commitment to Institutions.

Mentally ill individuals are not the only category of persons subject to the involuntary commitment process. Individuals with mental retardation, epilepsy and physical handicaps such as cerebral palsy have historically been institutionalized.[87] This Court's determination in the case at Bar will influence the development of substantive and procedural safeguards in commitment hearings involving a wide range of handicapped individuals.

It has only been during the past decade that the institutionalization movement has been reversed. This shift has occurred for several reasons. First, a shift in philosophy by experts in the field of developmental disabilities has resulted in the application of the principles of normalization and the developmental model.[88] Additionally, the federal government has recognized the need to maintain persons in the community and has passed legislation aimed at the provision of community services.[89]

[87] *See generally* Commission For the Control of Epilepsy and Its Consequences, The Plan For Nationwide Action on Epilepsy (1977) (on epilepsy); Kugel, *Introduction*, in President's Committee on Mental Retardation, Changing Patterns in Residential Services For the Mentally Retarded 3, 5 (rev. ed. 1976) (on mental retardation, cerebral palsy and other physical disabilities); Blatt, Souls in Extremis: An Anthology on Victims and Victimizers (1973) (on mental retardation).

[88] *See generally* Menolascino, Challenges in Mental Retardation (1977); President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded (rev. ed. 1976); Wolfensberger, The Principle of Normalization in Human Services (1972).

Finally, increasing judicial intervention has resulted in fewer persons being involuntarily hospitalized and growing numbers being provided with community-based placement alternatives.[90] While some courts have accomplished their purpose through procedural safeguards which make institutionalization more difficult, one court has recently ruled that confinement of mentally retarded individuals in a massive, isolated institution is unconstitutional,[91] ordering closure of the facility.[92]

[89] The Developmental Disabilities Assistance and Bill of Rights Act requires that treatment services and habilitation for persons with developmental disabilities be provided "in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6010. *See generally* notes 26-29, *supra*, and accompanying text.

[90] For civil commitment cases, see note 83, *supra*. Cases decided on right to treatment, least restrictive alternative and right to protection from harm theories include: *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *New York State Association for Retarded Children & Parisi* v. *Carey*, 357 F. Supp. 752 (E.D.N.Y. 1973) and 393 F. Supp. 715 (E.D.N.Y. 1975); *Horacek* v. *Exon*, 352 F. Supp. 71 (D. Neb. 1973) and No. 72-6-299 (D. Neb. 1975); *Wyatt* v. *Stickney*, 344 F. Supp. 387 M.D. Ala. 1972), *aff'd sub. nom., Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

[91] *Halderman* v. *Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977).

[92] *Halderman* v. *Pennhurst State School and Hospital*, No. 74-1345 (E.D. Pa. March 17, 1978), ordering the Commonwealth and county defendants "to provide suitable community living arrangements for the retarded of Pennhurst."

An emerging trend in social policy is permitting handicapped people to enjoy the opportunity to live full and meaningful lives in the mainstream of community life. Only in the recent past has society begun to recognize that handicapped individuals have the same rights and needs as other people. This evolving social model is an immense triumph for basic human rights and dignity.

Involuntary civil commitment and institutionalization are statues to a time when handicapped people were systematically confined and forgotten. These processes must be accountable for the severe curtailments of liberty which they seek to impose. Only a reasonable doubt standard of proof can insure that individuals are not incarcerated for ambiguous deviations from an arbitrary norm.

CONCLUSION

For the reasons discussed in this brief, *amicus* respectfully requests this Court to reverse the decision of the Supreme Court of Texas and hold that a "beyond a reasonable doubt" standard of proof is constitutionally required in involuntary civil commitment hearings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal from the Supreme Court of Texas

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE*

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Almost 24,000 of the nation's approximately 30,000 psychiatrists are members. Psychiatrists have the principal responsibility for providing expert testimony in civil commitment proceedings and for offering treatment to those who suffer from mental illness. The Association has par-

ticipated as *amicus curiae* in numerous cases involving mental health issues, including *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), and *Parham* v. *J.L.*, No. 75-1690, prob. juris. noted May 31, 1977, argued December 6, 1977, set for reargument January 16, 1978. The instant case, in which the Court must decide whether the criminal standard of proof beyond a reasonable doubt is required in proceedings involving civil commitment of the mentally ill, will have important implications for the treatment of serious mental illness and, consequently, may greatly affect the concerns and the work of the Association and its members.

The parties have consented to the filing of this brief. Copies of their consenting letters have been filed with the Clerk.

QUESTION PRESENTED

Whether the due process clause requires that the "reasonable doubt" standard applicable in criminal cases be applied to state proceedings for civil commitment of the mentally ill.

STATEMENT OF THE CASE

The State of Texas provides by statute for the temporary and indefinite commitment of the mentally ill. All applications for temporary commitment must be supported by statements of two physicians that the subject is mentally ill and needs observation or treatment in a mental hospital. Tex. Mental Health Code, Art. 5547-32. (Hereinafter cited only by article number.) The person to be committed is then notified of the application, Art. 5547-33, and a hearing is held at which he may request consideration of his case by a jury. Art. 5547-36. Commitment may not be authorized unless it is determined both that the person is mentally ill and that he requires observation or treatment for his own welfare and protection or for the protection of other persons. Art. 5547-38. Even if such determinations are made, the court may decline to order commitment where satisfactory treatment can be provided outside a mental hospital. *Ibid.*

Indefinite commitment is permitted only if temporary hospitalization has proved insufficient. A petition for indefinite commitment must state upon information and belief that the proposed patient has been hospitalized for at least sixty days for treatment or observation, is mentally ill, and needs hospitalization for his own welfare and protection or for the protection of others. Art. 5547-41. The person must have been examined by two physicians within 15 days prior to the filing of the petition, and the physicians must certify that he is mentally ill and requires hospitalization. Art. 5547-42. The person to be committed is notified of a hearing on the petition, Art. 5547-44, is entitled to representation by counsel (including appointed counsel), *ibid.*, and receives a jury trial unless he waives it in writing. Art. 5547-45. Before a person can be committed indefinitely, the jury must decide on the basis of competent medical testimony, Art. 5547-50, that he is mentally ill and needs hospitalization for his own welfare and protection or for the protection of others. Art. 5547-51; Art. 5547-52.

Appellant was first hospitalized for temporary treatment after a family altercation. Supp. Tr. 12, 13. Thereafter, he was interviewed by psychiatrists, including the county psychiatric examiner, who recommended that he be committed for a longer period. See, *e.g.*, Supp. Tr. 17-18, 19-20, 21-24. The State then filed a petition for his indefinite commitment. Tr. 1-2.

The hearing on the State's petition lasted five days. The State presented numerous witnesses including two psychiatrists who stated their opinion that appellant was mentally ill and required hospitalization. See, *e.g.*, State-

ment of Facts 384-385, 503; see generally *id.*, 352-591. Witnesses for appellant, including a psychologist, testified that he could not be reliably classified as dangerous and that hospitalization was not required.

At the conclusion of the evidence, the trial judge instructed the jury that the State had to prove by "clear, unequivocal and convincing evidence" that appellant was "mentally ill" and that he "require[d] hospitalization in a mental hospital for his own welfare and protection or the protection of others." J.S. App. D-5; see Art 5547-51; Art 5547-52. Appellant objected to the charge, contending that the State had to prove the statutory criteria beyond a reasonable doubt. J.S. App. D-8. The judge also explained to the jury that the term "mentally ill" means "a mental condition which is such as to substantially impair the person's mental health." J.S. App. D-5. The jury then determined that appellant should be committed. It did not indicate whether its determination was based on a finding that he required hospitalization for "his own welfare and protecton," or for "the protection of others," or both.

Appellant appealed the commitment order to the Texas Court of Civil Appeals. See Art 5547-57. He contended, *inter alia*, that due process required the State to establish the criteria for commitment by proof beyond a reasonable doubt. The Court of Civil Appeals agreed, and remanded the case to the trial court for reconsideration according to the stricter standard. *Addington* v. *State*, 546 S.W.2d 105 (1976).

The Texas Supreme Court reversed, relying on its then-recent decision in *State* v. *Turner*, 556 S.W.2d 563 (1977), *cert. denied*, No. 77-6082, March 20, 1978. In *Turner* the court had declined to adopt a standard of "clear and convincing evidence" for civil commitment proceedings, stating that in its jurisdiction only the standards of preponderance of the evidence and proof beyond a reasonable doubt were recognized. The court then concluded that the preponderance of the evidence standard was most appropriate for civil commitment proceedings, noting that it perceived "several distinctions between civil commitment proceedings and criminal proceedings which justify the lesser standard [in civil commitment proceedings]." 556 S.W.2d at 566.

The court pointed out that a patient's loss of liberty resulting from hospitalization was less severe than the loss caused by imprisonment because the patient, unlike the convicted criminal, is "entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others." *Ibid.* In addition, the court found that the lesser standard was justified by the "significant difference between the retrospective assessment of conduct made by a jury in a criminal case, and the determination of *future* conduct and *future* need made by a jury in a civil commitment." *Ibid.* (emphasis in original). If the more severe reasonable doubt standard were to be adopted, the court said, "the State's ability to act as *parens patriae* for the mentally ill would be impaired." As a result "a person in need of care [could] be deprived of aid because he is mentally incapable of knowing his needs and the medical profession cannot meet a too strict burden." *Ibid.*

The Texas Supreme Court thus affirmed the order of commitment in this case, ruling that "[s]ince the jury found [appellant] to be mentally ill under a stricter standard than is required, the instruction given does not constitute harmful error." J.S. App. A-2. Appellant, in his appeal here, contends that due process prohibits his commitment upon any standard less than reasonable doubt. J.S. 3. This Court noted probable jurisdiction on April 17, 1978.

SUMMARY OF ARGUMENT

It is the position of the American Psychiatric Association that neither the Constitution nor enlightened policy requires the reasonable doubt standard applicable in criminal cases to be applied to civil proceedings for commitment of the mentally ill.

a. The interests at stake in civil commitment proceedings are significantly different from the interests involved in criminal or juvenile proceedings (pp. 9-12 *infra*). The primary state concern in civil commitment proceedings is to provide assistance to seriously ill persons, a remote concern at best in criminal cases. Hospitalization of the mentally ill is sought not as an end in itself, but only as a necessary consequence of giving medical treatment. As a result, the commitment process cannot be viewed as a strictly adversarial one: in most cases, the ultimate interests of the State and the individual in his care and treatment should be largely the same.

Application of the analysis followed in *In re Winship*, 397 U.S. 358 (1970), to require use of the reasonable doubt standard in juvenile proceedings leads to a different result here. Although there are superficial similarities between the loss of liberty and social stigma associated with criminal convictions and that resulting from civil commitment, at bottom the differences, both qualitative and quantitative, are more compelling (pp. 12-14 *infra*). Similarly, community respect for the law and individual security will more likely be advanced by permitting responsive procedures in civil commitment proceedings than by forcing adherence to the standards accepted in the criminal law (pp. 14-15 *infra*). A balancing of the comparative social and individual risks, the approach favored

by Mr. Justice Harlan in *Winship*, *supra*, cuts the same way (pp. 15-16 *infra*).

b. Nor would imposition of a constitutional reasonable doubt standard be sound policy. The proper procedures for commitment cannot reasonably be viewed apart from the substantive criteria for commitment, which vary from state to state. A loose substantive standard for commitment may in fact justify a stricter standard of proof, but the Texas statutes at issue here have never been authoritatively construed by the state courts (pp. 17-18 *infra*). Moreover, different criteria serve different purposes. To apply a reasonable doubt standard in all commitment cases will further criminalize the commitment process and inhibit essential state efforts to care for the mentally ill.

ARGUMENT

The question in this case is whether due process requires the adoption of a nationwide standard of proof beyond a reasonable doubt in civil commitment. Although this issue is cast in limited procedural terms, *amicus*, the American Psychiatric Association, believes that the decision of this Court will affect far more than the question of procedure immediately involved.[1]

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[1] We note at the outset that, in contrast to the position taken by *amici curiae*, National Association of Mental Health, *et al.*, Br. at 5-6, appellant raises no issue regarding the constitutional necessity for an intermediate standard of proof, such as clear and convincing evidence. The jury in this case, instructed according to the clear and convincing evidence standard, found that appellant was subject to commitment; the Texas Supreme Court, applying a preponderance of the evidence standard, upheld the order of commitment. Appellant can prevail, therefore, only if this Court directs that the statutory prerequisites for civil commitment must be proved beyond a reasonable doubt (or, at least, by more than clear and convincing evidence). If it does not, there is no occasion for this Court to fashion a constitutional rule of procedure binding on the states that will provide no benefit to appellant.

Any complete analysis of procedural safeguards must necessarily involve an examination of substantive standards for civil commitment, and of the role of government in the treatment of the mentally ill. During the past decade, lower federal courts have been inundated with litigation challenging both the substantive standards and the procedural safeguards for civil commitment.[2] Although various constitutional questions have been raised, most of the challenges essentially demand that the legal approach to the confinement of the mentally ill be made to conform to that of the criminal law.[3] The effect of this litigation has largely been to eviscerate the states' *parens patriae* function in civil commitment, while at the same time circumscribing their police powers by establishing increasingly narrower and more specific requirements for proving dangerousness.[4] Not surprisingly, one dramatic result of these changes has been that many seriously mentally ill people have "escaped" civil commitment only to find themselves abandoned by society.[5]

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[2] *E.g., Lessard* v. *Schmidt*, 349 F.Supp. 1078 (E.D. Wisc. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (1974), *vacated*, 421 U.S. 957 (1975), *prior judgment reinstated*, 413 F. Supp. 1318 (1976); *Suzuki* v. *Alba*, 438 F.Supp. 1106 (D. Hawaii 1977); *French* v. *Blackburn*, 428 F.Supp. 1351 (M.D. N.C. 1977); *Goldy* v. *Beal*, 429 F.Supp. 640 (M.D. Pa. 1976); *Stamus* v. *Leonhardt*, 414 F.Supp. 439 (S.D. Iowa 1976); *Suzuki* v. *Quisenberry*, 411 F.Supp. 1113 (D. Hawaii 1976); *Coll* v. *Hyland*, 411 F.Supp. 905 (D. N.J. 1976); *Lynch* v. *Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974); *Bell* v. *Wayne County General Hospital at Eloise*, 384 F.Supp. 1085 (E.D. Mich. 1974).

[3] See Stone, *Recent Mental Health Litigation: A Critical Perspective*, 134 Am. J. Psychiatry 273 (1977).

[4] See, *e.g., Lessard* v. *Schmidt, supra*, 349 F.Supp. at 1093, which held, *inter alia*, that the Constitution requires the State to prove an overt act, attempt or threat as a precondition to civil commitment.

[5] This trend has been most obvious in highly populated states, where mental patients have increasingly been caught up in low-

This Court, as it recognized in *Jackson* v. *Indiana*, 406 U.S. 715, 728 (1972), has had very little to say about these important judicial developments. See *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). Thus the instant case will have substantial symbolic as well as practical significance. *Amicus* believes that adoption of the reasonable doubt standard would do much to assure the unfortunate rigidification and criminalization of the civil commitment process at a time when the legal, social and medical aspects of that process are in a state of dynamic growth and change. In particular, *amicus* is concerned that constitutional imposition of such a standard would effectively shut the door on the sensible application of *parens patriae* civil commitment.

I. Due Process Does Not Require That The Criteria For Civil Commitment Be Proved Beyond A Reasonable Doubt.

Any constitutional determination of "what process is due" in a particular situation involves a careful assessment of the likely impact of a specific procedure on the competing interests to be affected thereby. See, *e.g., Matthews* v. *Eldridge*, 424 U.S. 319 (1976).[6] In criminal cases, this Court has concluded that the interests of the

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level criminal behavior as they are consigned to the blight of urban ghettos. See Bachrach, *Deinstitutionalization: An Analytical Review and Sociological Perspective* (NIMH, 1976); Robitscher, "Moving Patients Out of Hospitals—In Whose Interest?" *in* P. Ahmed & S. Plog, eds., State Hospitals: What Happens When They Close 141 (1976); Schwed, *Protecting the Rights of the Mentally Ill*, 64 A.B.A.J. 564 (1978).

[6] Although appellant claims that "the State's alleged interests in a lower evidentiary standard are simply irrelevant under the *Winship* test," Br. at 29, *Winship*, itself, refutes this contention. There the Court fully considered the State's interests but found them insufficient to overcome the need for a standard of proof beyond a reasonable doubt. 397 U.S. at 366-367. Due process always involves a comparative balance. See *Patterson* v. *New York*, 432 U.S. 197 (1977); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975).

individual so outweigh the State's interests that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, *supra*, 397 U.S. at 364. The Court further has ruled that the same rigorous standard applies when juveniles "are charged with violations of a criminal law," since "[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child." *Id.* at 365.

"The requirement of proof beyond a reasonable doubt in a criminal case is 'bottomed on the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" *Patterson* v. *New York*, 432 U.S. 197, 208 (1977) (citation omitted). The calculus in civil commitment proceedings, however, may be radically different. In a criminal case, society alone bears the risk of a mistaken release: the freed criminal receives an obvious benefit. In civil commitment proceedings, the proposed patient bears the risk of mistaken release himself. The legal system does no favor for a person needing medical care when it denies treatment to him. If he later harms others, society may share, but still only share, the consequences of having imposed unduly restrictive procedural barriers to commitment.

The differences in relative risks stem from the differences in the systems themselves. In criminal matters the State and the individual are purely adversaries. The State's purpose is essentially to punish the guilty, for reasons of individual deterrence and retribution, and to make an example of the offender so that others will be deterred as well. See, *e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion). The individual's interest is solely to avoid conviction and its attendant consequences.

The same is true, though perhaps to a lesser extent, in juvenile proceedings. A delinquency determination "is by definition bottomed on a finding that the accused *committed a crime*." *In re Winship*, *supra*, 397 U.S. at 374 (Harlan, J., concurring) (footnote omitted) (emphasis added). In both juvenile and adult trials, the issue thus is whether the defendant committed a particular harmful act with the requisite intent. Not surprisingly in these circumstances, the juvenile, seeking to avoid conviction, views his interest as diametrically opposed to that of the State.

Civil commitment, by contrast, implicates far different interests. The paramount societal interest, one that is at best of peripheral concern in the criminal law, is to provide assistance to those who are seriously mentally ill. As the Illinois Supreme Court recently stated:

> "Our free society's interest in prospectively protecting itself from dangerous or harmful conduct, standing alone, suffices to justify only minimal infringements upon an individual's person [*sic*] liberty. A high value has also been placed, however, on our society's obligation to protect and care for those of its members unable to protect or care for themselves. It is important to a concerned and humane society that the margin of error be held to a minimum in denying such protection and care." *In re Stephenson*, 367 N.E.2d 1273, 1276-77 (1977).

The individual's interests in a civil commitment proceeding also are different from those at stake in a criminal case. While in both instances the individual may have a significant interest in protecting his liberty, in a criminal case this is his only concern. Rarely, if ever, will a convicted criminal agree that incarceration was actually in his best interest. In civil commitment, however, it may indeed be in the best interest of the individual to secure treatment designed "to restore him to a useful life and

place in society." Art 5547-2. See Gove & Fain, *A Comparison of Voluntary and Committed Psychiatric Patients*, 34 Arch. Gen. Psychiatry 669, 675 (1977) (75.3% of committed patients studied subsequently reported that hospitalization helped; 5.5% of such patients reported hospitalization was harmful). Moreover, if the allegations of the commitment petition are true—that is, if the individual should properly be committed—he will not typically be in a position to assess his own interests rationally and may indeed have failed to seek voluntary treatment for precisely this reason. See Spensley, *et al.*, *Involuntary Hospitalization: What For and How Long?*, 131 Am. J. Psychiatry 219 (1974) (68% of committed patients subsequently accepted recommendation for voluntary treatment).

The significance of these distinctions is clear when viewed against the specific considerations found crucial in *Winship*. There, the Court identified four factors justifying the reasonable doubt standard in criminal cases: (1) the accused's interest in liberty; (2) the accused's interest in avoiding stigmatization; (3) the community's respect for the moral force of the criminal law; and (4) the individual's need for the security of knowing that he cannot be convicted of a crime without the government proving his guilt with the utmost certainty. 397 U.S. at 363-64. Consideration of these factors in the context of civil commitment leads to a different result.

The strongest point of similarity between the criminal law and civil commitment obviously lies in the first factor, the potential loss of liberty. But even this factor is substantially different in the two systems. In the criminal law, the loss of liberty typically is, in and of itself, a desired societal goal, for purposes of deterrence and retribution. In civil commitment, by contrast, deprivation of liberty is not an end in itself; it is, rather, a derivative consequence of the need for intensive care and treatment. Indeed, in contrast to the criminal justice system, the

State has every interest in minimizing the committed person's loss of liberty.

Moreover, in a psychiatric hospital truly designed for effective treatment, the qualitative intrusion on the individual's liberty is different from that resulting from imprisonment. See generally J. Maxmen, G. Tucker & M. LeBow, Rational Hospital Psychiatry: The Reactive Environment (1974). When the inappropriate punitive aspects of hospitalization are removed, the individual is often provided significant freedom of movement. The "open" ward of today's psychiatric facilities is making an anachronism of the "locked door" of the past. Similarly, the acknowledged therapeutic effect of increased respect for the patients' privacy has led to less monitoring and intrusion. This increased concern for patient liberty has no counterpart in the criminal law, where protection and security are still the dominant considerations.

Finally, it is important to note the grave intrusion on liberty that is inflicted by a severe mental illness. The aphorism that "stone walls do not a prison make" is a particularly apt reminder of the confining nature of a debilitating mental illness. In a real sense, many severely mentally ill persons may have little recognizable "liberty" to give up in exchange for hospital treatment. See Chodoff, *The Case for Involuntary Hospitalization of the Mentally Ill*, 133 Am. J. Psychiatry 496 (1976). A meaningful assessment of liberty must involve analysis of such qualitative as well as quantitative considerations.

Appellant also overstates the stigma resulting from civil commitment. What is truly, if unfortunately, stigmatizing is severe mental illness and its resulting symptomatology. See Schwartz, *et al.*, *Psychiatric Labeling and the Rehabilitation of the Mental Patient*, 31 Arch. Gen. Psychiatry 329 (1974) ("psychiatric treatment per se is less important in determining rejection of the men-

tally ill than is the ex-patient's level of impairment"). As the sources cited by appellant plainly demonstrate, Br. at 21-23, society has an irrational fear of the aberrant, albeit non-dangerous, behavior that results from mental illness. Long before civil commitment existed such stigma existed. There is no basis for suggesting that the voluntary mental patient is less stigmatized than the involuntary patient. Indeed, in the long-run the patient who is cured or whose symptoms are ameliorated is less likely to suffer from adverse social responses than the untreated patient whose bizarre behavior can be readily witnessed by all who come in contact with him. The patient who is abandoned faces the prospect of greater stigmatization, resulting from the aggravated symptoms of an untreated disease, and from the possibility of getting enmeshed in the criminal justice system.

Nor will community respect for the law be enhanced by imposing the reasonable doubt standard in civil commitment cases. To the contrary, the community may well become increasingly disenchanted if members who engage in irrational and destructive behavior are denied medical assistance because of needless procedural barriers. Respect for the law is more likely to be advanced by a reasonable accommodation with medical capabilities than by increased conflict between legal and medical theory at the patient's possible expense. At the very least, the law should permit a flexible response to changes in medical knowledge rather than convert a particular procedure into a constitutional requirement.

The individual's concern for security in everyday life also justifies a less rigorous burden of proof in civil commitment. To be genuinely secure, an individual must know not just that he will be protected from unwarranted hospitalization, but that he can receive help if he becomes a victim of a serious mental illness, even if he is unable to perceive the need for such assistance. There

can be little comfort in knowing that legal procedures—rather than medical knowledge—will be the key factor in determining whether proper treatment will be provided.

The distinctions between criminal law and civil commitment are also compelling when viewed according to the analysis advanced by Mr. Justice Harlan in his concurrence in *Winship*. There, Justice Harlan succinctly noted that "the choice of the standard for a particular variety of adjudication . . . reflect[s] a very fundamental assessment of the comparative social costs of erroneous factual determinations." 397 U.S. at 370 (footnote omitted). In criminal and juvenile cases, he concluded, proof beyond a reasonable doubt is required because "it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372.

The "social costs" of erroneous decisionmaking in civil commitment cases differ substantially from those in criminal cases. As indicated above, in contrast to what occurs in the criminal law, failure to commit a person who properly should be committed may prevent him from "getting needed care or treatment which will enable him to function normally . . ." *In re Stephenson*, *supra*, 367 N.E.2d at 1277.

On the other hand, the consequences of an erroneous decision to commit are not likely to be so grave as those attending an erroneous criminal conviction. First, the criminal process is based on the implicit philosophical assumption that "[t]he line between guilt and innocence is, in an abstract sense, clear, *i.e.*, either defendant did or did not commit the offense . . ." *In re Stephenson*, *supra*, 367 N.E.2d at 1277. In short, a definite boundary line separates the guilty from the innocent, and to convict any of those on the "innocent" side of the line is a complete injustice. No such bright line can be drawn in civil commitment cases, where the criteria necessarily lead to questions of degree. Thus, although any "erroneous" com-

mitment is unfortunate, it is nevertheless true that if a lower burden of proof were to result in such commitments, it would affect those who partially satisfy the criteria, rather than those who are wholly free of such characteristics.

More significantly, the results of erroneously commiting persons who partly satisfy the substantive standards are different from those of incarcerating innocent people. Under Texas law, for example,

> "[t]he involuntary mental patient is entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others." *State* v. *Turner*, *supra*, 556 S.W.2d at 566 (citations omitted).

Thus, if erroneously committed, a person at least has the chance to receive potentially helpful treatment. Moreover, as a result of the "recurrent review" of the patient's status under Texas law, opportunity exists for early detection and release of an erroneously committed patient. No such opportunity exists for the erroneously convicted criminal; parole, of course, does not normally depend upon subsequent discovery that the defendant did not commit the crime.[7]

[7] These kinds of distinctions regarding the consequences of an erroneous factual finding did not go unnoticed by Justice Harlan in *Winship*, who compared delinquency determinations with "persons in need of supervision [PINS]" adjudications in New York. 397 U.S. at 374 n.6. He stated that a PINS adjudication was not bottomed on a violation of the criminal law, but rather applied to a child "who is an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." *Ibid.* In view of this distinction, Justice Harlan made clear that "in a PINS type case, the consequences of an erroneous factual determination are by no means identical to those involved [in a delinquency case]," *ibid.*, even though a PINS determination can result in a deprivation of a child's liberty. In terms of the "consequences of an erroneous factual determination," civil commitment proceedings are more akin to a PINS determination than a criminal trial.

II. Adoption Of A Constitutional Standard Of Proof Beyond A Reasonable Doubt In Civil Commitment Cases Would Cause A Serious Erosion Of The State's Role As *Parens Patriae*.

Appellant and *amici curiae*, National Association for Mental Health, *et al.*, strongly suggest that the importation of criminal standards of proof into civil commitment proceedings is good policy as well as good law. That suggestion merits closer examination.

Perhaps the most remarkable feature of this case is that appellant is asking the Court to adopt a nationwide standard of the highest degree of proof before it has specifically addressed the constitutional limitations on the substantive criteria that can justify commitment.[8] But surely it makes little sense to consider procedural standards of proof without regard to the substantive criteria to be proved. The Texas statute, for example, states that, before a person can be committed, it must be shown that he "requires hospitalization in a mental hospital for his own welfare and protection or for the protection of other persons," Art. 5547-52; neither the statutes nor the case law, however, define the scope of individual welfare and protection. It could in fact be easier to prove a broad interpretation of these criteria beyond a reasonable doubt than to prove a narrow interpretation by a preponderance of evidence. In the absence of more precise substantive standards, therefore, the value of an inflexible procedural rule seems limited.

Moreover, different substantive standards serve very different purposes. In *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 573-74, the Court noted that the "contemporary"

[8] See Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings*, 1977 Det. Coll. L. Rev. 209, 210 (1977) ("[i]t is important to keep in mind that in any consideration of the law relating to civil commitment the starting point must be what it is that must be proved, not how much must it be proved by.").

justifications for civil commitment generally require a showing that a person is "mentally ill" and that his hospitalization is likely "to prevent injury to the public, or to ensure his own survival or safety or to alleviate or cure his illness." Thus, the Court recognized that the legal phrase "civil commitment" embodies various substantive criteria, serving different societal ends. On the one hand, civil commitment reflects the pure *parens patriae* concern to help the seriously disturbed citizen who can be treated effectively; on the other hand, it reflects exercise of society's police power to protect itself against what it perceives to be the dangerous mentally ill, with perhaps the ancillary concern of providing treatment to such people.

These concerns are distinct—indeed, almost polar opposites. Moreover, it is obvious that the proof relating to each is markedly different. Nevertheless, appellant makes a broadside argument that all civil commitments—irrespective of the purpose or the nature of proof—must be established by proof beyond a reasonable doubt.[9] Acceptance of this uniform standard will have the derivative, if unintended, effect of forcing the states to develop the kinds of substantive criteria that can be proved beyond a reasonable doubt. This, in turn, is likely to erode, if not destroy, the *parens patriae* aspects of civil commitment.

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[9] *Amici curiae*, National Association of Mental Health, *et al.*, apparently attempts to rescue appellant's broadside by arguing that proof beyond a reasonable doubt is required when "an individual is sought to be confined on grounds that he or she *constitutes a danger to others* . . ." Br. at 11 (emphasis supplied). But this case involves *only* a facial challenge to the Texas commitment statute which provides for commitment on two distinct grounds—*i.e.*, individual "welfare and protection" or "protection of others." Art. 5547-52. Indeed, this Courts' appellate jurisdiction is invoked specifically on the basis of appellant's facial challenge. See 28 U.S.C. § 1257(2). Hence, this case is not limited to the underlying dangerousness predicate of *amici*'s brief.

The *parens patriae* aspects of commitment focus on the individual's mental condition and the likely consequences of that condition for him, as well as the prospect that his condition can be cured or alleviated through intervention. Such factors inescapably involve consideration of medical concepts such as diagnosis and prognosis, concepts that have provoked considerable judicial and social controversy. See, *e.g.*, *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956).[10] However that controversy ultimately may be resolved, nothing will be gained in the interim by making hospitalization for the mentally ill contingent on meeting a legal standard of proof that ignores existing (though limited) medical knowledge.[11] For, while *amicus* is not prepared to say that these medical matters can never be established with the kind of certainty required by the reasonable doubt standard,[12] the pragmatic realities of the adversary process make it apparent that a competent attorney almost invariably will be able to raise a reasonable doubt with respect to these medical criteria.[13] As Judge Sobeloff has acknowledged:

> "After all, the ultimate issue is not as in a criminal case whether an alleged act was committed or event

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[10] In this respect, it should be noted that these kinds of subjective criteria are distinctly different from "intent" as that concept is applied in the criminal law. "Intent," as the Court made clear in *Mullaney* v. *Wilbur*, *supra*, 421 U.S. at 702, is an "objective behavioral criterion" traditionally "established by adducing evidence of the factual circumstances surrounding the commission of the [criminal act]."

[11] See note 15 *infra*.

[12] It should be noted that in recent years confidence in the reliability of psychiatric diagnoses of serious mental illness has increased. See A. Stone, Mental Health and Law: A System In Transition 65-66 (NIMH, 1975); Helzer, *et al.*, *Reliability of Psychiatric Diagnosis*, 34 Arch. Gen. Psychiatry 136 (1977).

[13] This is particularly true because, despite considerable recent judicial concern regarding the quality of counsel representing the individual in commitment cases, see, *e.g.*, *Memmel* v. *Mundy*, 249 N.W.2d 573 (Wisc. 1977), there is no comparable concern regarding the quality of counsel who present the case for commitment.

> occurred, but the much more subjective issue of the individual's mental and emotional character. Such a subjective judgment cannot ordinarily attain the same 'state of certitude' demanded in criminal cases." *Tippet* v. *Maryland*, 436 F.2d 1153, 1165 (4th Cir. 1971) (opinion concurring and dissenting). See also *Lynch* v. *Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974) (3 judge court).[14]

Dissatisfaction with the uncertainty inherent in the medical aspects of civil commitment has already led to a shift in focus from mental illness itself to the behavioral effects of that illness; in the traditional legal formula of "mental illness plus something else," the emphasis has been placed on the "something else" (usually dangerousness).[15] In turn, since there is no established basis for making even remotely accurate predictions about future harmful behavior,[16] the focus on dangerousness has shifted the inquiry to *past* antisocial or harmful behavior. See, *e.g.*, *Lessard* v. *Schmidt*, *supra*; *Lynch* v. *Baxley*, *supra*. This process of "criminalization" almost inexorably demands the adoption of the reasonable doubt standard. For once the dominant focus of civil commitment becomes past antisocial behavior, the purpose of civil commitment begins to closely mirror that

[14] An article in the Harvard Law Review, even as it urges a standard of proof beyond a reasonable doubt in civil commitment, candidly acknowledges that "[g]iven the relatively undeveloped state of psychiatry as a predictive science, potential detainees probably should quite often be able to raise at least a reasonable doubt that they fall within the standards." Developments in the Law—Civil Commitment, 87 Harv. L. Rev. 1190, 1302 (1974).

[15] This dissatisfaction has also led to the futile search for a "legal," as distinguished from a medical, definition of mental illness. Cf. *Commonwealth ex rel. Finken* v. *Roop*, 339 A.2d 764 (Pa. Super. 1975); *In re Beverly*, 342 So.2d 481 (Fla. 1977).

[16] See, e.g., A. Stone, Mental Health and Law: A System In Transition, *supra* note 12, at ch.2; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Calif. L. Rev. 693 (1974).

of the criminal law (positioning society *against* the individual),[17] and the issues in dispute (*i.e.*, the occurrence of past acts) are traditionally subject to proof beyond a reasonable doubt.[18]

But this argument proves too much. Absolute adherence to the reasonable doubt standard will increasingly turn civil commitment into a function of the police power where the State will seek to prove prior harmful acts by the traditional criminal standard of proof. What it will not do is alleviate the severe and debilitating mental illness that plagues many in our society. The vast majority of people suffering from serious mental illness have not committed harmful acts and are not dangerous to other people;[19] they *can*, however, have their conditions cured or effectively controlled with proper psychiatric treatment.[20] Yet it is these people who, if appellant's argument prevails, will be deprived of the benefits of civil commitment.

[17] It should also be noted that psychiatry's ability to treat many of those who are actually violent is limited. See Stone, Comment, 132 Am. J. Psychiatry 829 (1975). Hence these commitments often cannot be justified on the ground that the State is capable of providing assistance to the patient.

[18] This is essentially the argument advanced both by appellant and *amici curiae*, National Association of Mental Health, *et al.* Each suggests, *e.g.*, Appellant's Br. at 32; Amici's Br. at 19-20, that adoption of the reasonable doubt standard would present no practical problems of proof precisely because civil commitment *should* be linked to proof of prior harmful acts. Indeed, *amici curiae* candidly acknowledged this position by stating that "[c]ertainly it should not be 'impossible' for the state to meet *some* substantive standard 'beyond a reasonable doubt.'" Br. at 22 (emphasis in original).

[19] See, *e.g.*, Gulevich & Bourne, "Mental Illness and Violence," *in* D. Daniels, *et al.*, eds., Violence and the Struggle for Existence 309 (1970). See also sources cited at n.16 *supra*.

[20] See, *e.g.*, Gove & Fain, *A Comparison of Voluntary and Committed Psychiatric Patients*, 34 Arch. Gen. Psychiatry 669, 675 (1977).

It is not an adequate response to suggest that such people can seek voluntary treatment. While the American Psychiaric Association strongly endorses voluntary treatment, the incontrovertible fact remains that there will always be a small but significant number of people who, *because* they suffer from mental illness, will not or cannot seek treatment. These include, for example, people who, while not objecting to treatment, simply fail to seek it, as well as severely depressed persons who believe that they are "unworthy of treatment," or paranoid schizophrenic persons who claim that "the doctors are undercover agents who are part of the conspiracy against them." For such people, the choice is between "involuntary" commitment or abandonment. And, as the court said in *Coll* v. *Hyland, supra*, 411 F.Supp. at 910, "[w]hen the choice is between a loss of life or health and a loss of liberty for a brief period of time, the preferable alternative is apparent." The fact that psychiatry has not reached the level of certainty required by the reasonable doubt standard should not mean that this "preferable alternative" will no longer be available. See *Greenwood* v. *United States, supra*, 350 U.S. at 376.

To be sure, the strength of this position depends not merely on the availability of curative treatment but, more significantly, on its actual provision to the committed patient. There can be no doubt, as appellant has argued, Br. at 16-18, that many who have been committed in the past have had to spend time in grim and destructive institutions that are sometimes less conducive to their well-being than prisons. This tragic reality has strongly kindled the argument for "criminalization" of civil commitment: if hospitals are like prisons, the criteria for becoming a patient should be similar to those for becoming a convict. But this remedy does not meet the problem. If a court provides the most rigorous safeguards and standards of proof, but then confines a patient

in a hospital where little or no care and treatment are provided, it is difficult to understand how an acceptable result, either morally or constitutionally, has been achieved.

The proper remedy to the problem of prison-like hospital conditions is to correct the conditions, not to strengthen the procedural antecedents to hospitalization. See, *e.g.*, *Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974). The contemporary psychiatric hospital is capable of providing effective treatment in a relatively short time, and in an environment that provides patients with maximum liberty compatible with their conditions.[21] Security measures can be minimized; locked doors and physical restraints need be used only in extreme situations.

These improvements have begun to be realized. Increasingly, state legislatures have allocated more funds for hospitalized psychiatric patients. And, despite the claim by proponents of "criminalization" that there is marked pressure by psychiatrists to confine people needlessly, the evidence is to the contrary: the census of state and county hospitals has declined dramatically in the past decade.[22] Likewise, the length of stay for hospitalized psychiatric patients has so decreased that at least 75% are discharged within 3 months, and 87% within 6 months.[23] Continuation of this progress, and the achieve-

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[21] For this reason, *amicus* has proposed as an official policy statement that patients only be involuntarily hospitalized in facilities accredited by the Joint Commission on the Accreditation of Hospitals. Such accreditation assures that at least the capacity and environment for effective treatment are available.

[22] Between 1965 and 1974 the number of resident patients in state and county mental hospitals decreased from 475,202 to 215,573. See Ozarin, Redick & Taube, *A Quarter Century of Psychiatric Care, 1950-1974: A Statistical Review*, 27 Hosp. & Comm. Psychiatry 515, 516 (1976).

[23] See Ozarin, Redick & Taube, *supra* note 22, at 516. Those data are based on a 1971 survey. While apparently no comparable later data exist, *amicus* is confident that the length of hospitalization for psychiatric patients has decreased further in subsequent years.

ment of other much needed improvements, will not be promoted by adoption of the criminal standard of proof beyond a reasonable doubt in civil commitment cases.[24]

In any event, in view of the importance of the issue, if this Court is to eradicate or severely limit the *parens patriae* component of civil commitment, it should do so when the issue is directly presented, not as an incidental consequence of resolving a narrow procedural issue. To do otherwise is surely to allow the tail to wag the dog.

III. Proper Concern For Flexibility In The Effective Administration Of The Varying State Commitment Laws Requires That The Individual States Determine The Burden Of Proof In Civil Commitment Cases.

This Court, noting in an analogous case its concern for flexibility and experimentation in state laws, recently made clear that Due Process

> "has required that only the most basic procedural safeguards be observed; more subtle balancing . . . [has] been left to the legislative branch." *Patterson* v. *New York*, *supra*, 432 U.S. at 210.

See also *Specht* v. *Patterson*, 386 U.S. 605 (1967), where the Court required certain procedural safeguards prior to imposition of post-conviction commitment under a sex offender statute, but did not include proof beyond a reasonable doubt among these.

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[24] On the contrary, criminalization of civil commitment will insure a hospital population that more closely resembles a prison population. See, Zitrin, Hardesty & Burdock, *Crime and Violence Among Mental Patients*, 133 Am. J. Psychiatry 142 (1976); Sosowsky, *Crime and Violence Among Mental Patients Reconsidered in View of the New Legal Relationship Between the State and the Mentally Ill*, 135 Am. J. Psychiatry 33 (1978). Such patients will require the hospital to adopt the kinds of anti-therapeutic security measures used in prisons.

The Brief for *amici curiae*, the National Association for Mental Health, *et al.*, contains a detailed appendix reflecting that civil commitment laws have undergone dramatic changes in recent years. The survey indicates that the substantive criteria for commitment as well as the procedural safeguards attendant thereto vary greatly among the fifty states.[25] See also, Share, *The Standard of Proof In Involuntary Commitment Proceedings*, *supra* note 8, at 209. Some states, such as Wisconsin, essentially have adopted the criminal model of commitment, requiring substantive criteria that focus on prior acts, and procedural safeguards that include proof beyond a reason-

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[25] This factor alone indicates that there is not the kind of unanimity that would augur for a constitutional rule. See *Leland* v. *Oregon*, 343 U.S. 790, 798 (1952); *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 548 (1971). Amici's survey indicates that only seven states have adopted the reasonable doubt standard by statute. And while some courts have upheld the standard, the decided majority have ruled against it. Our research indicates that the following 14 courts have rejected the reasonable doubt standard in civil commitment cases. *French* v. *Blackburn*, 428 F.Supp. 1351, 1360 (M.D. N.C. 1977); *Stamus* v. *Leonhardt*, 414 F.Supp. 439, 449 (S.D. Iowa 1976); *Doremus* v. *Farrell*, 407 F.Supp. 509, 517 (D. Neb. 1975); *Bartley* v. *Kremens*, 402 F.Supp. 1039, 1052 (E.D. Pa. 1975), *vacated on other grounds*, 431 U.S. 119 (1977); *Lynch* v. *Baxley*, 386 F.Supp. 378, 393 (M.D. Ala. 1974); *State* v. *Turner*, 556 S.W.2d 563 (Tex. 1977); *In re Stephenson*, 367 N.E.2d 1273 (Ill. 1977); *In re Beverly*, 342 So.2d 481 (Fla. 1977); *State* v. *Kroll*, 344 A.2d 289 (N.J. 1975); *In the Matter of Valdez*, 540 P.2d 818 (N.M. 1975); *In the Matter of Ward M.*, 533 P.2d 896 (Utah 1975); *State ex rel. Hawks* v. *Lazaro*, 202 S.E.2d 109, 126-27 (W.Va. 1974); *In re Levias*, 517 P.2d 588 (Wash. 1973); *Fhagen* v. *Miller*, 317 N.Y.S.2d 128, 138 (Sup. Ct. N.Y. Co. 1970), *modified*, 321 N.Y.S. 2d 61 (App. Div. 1971), *modified*, 328 N.Y.S.2d 393 (Ct. App. 1972). The following 6 courts have upheld the reasonable doubt standard in commitment cases: *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Suzuki* v. *Quisenberry*, 411 F.Supp. 1113, 1132 (D. Hawaii 1976); *Lessard* v. *Schmidt*, 349 F.Supp. 1078, 1095 (E.D. Wisc. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F.Supp. 1376 (1974), *vacated*, 421 U.S. 957 (1975), *prior judgment reinstated*, 413 F.Supp. 1318 (1976); *Superintendant of Worster State Hospital* v. *Hagbert*, 372 N.E.2d 242 (Mass. 1978); *Proctor* v. *Butler*, 380 A.2d 673 (N.H. 1977); *In re Hodges*, 325 A.2d 605 (D.C. 1974).

able doubt. Other states, such as Missouri, still opt for a considerable degree of *parens patriae* authority in this area.

Amicus views this diversity as constructive. For even though we strongly favor *parens patriae* commitment power, we recognize that there are serious divisions in our society about this issue. By allowing the political process to grapple with these competing claims, society will best be able to benefit from the knowledge to be gained from experimentation and diversity.[26] Uniform imposition of the reasonable doubt standard will stymie this dynamic process.[27]

The Task Panel on Legal and Ethical Issues in its report to the President's Commission on Mental Health has recently stated: "[L]egal closure on the question of commitment criteria would now be premature and unwise." Task Panel Reports Submitted to the President's Commission on Mental Health 1359, 1445 (Vol. IV, 1978). At a time when long-denied rights are beginning to be recognized and when courts and legislatures are addressing the difficult and sensitive choices between legal rights and social results, this Court should be especially "reluctant to disallow the states to experiment further and to seek in new and different ways the elusive answers

[26] See *Greenwood* v. *United States*, *supra*, 350 U.S. at 376 ("Certainly denial of constitutional power of commitment . . . ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues.").

[27] In this regard it is well to recall Justice Harlan's admonition in *In re Gault*, 387 U.S. 1, 77-78 (1967) (citation omitted):

> "I very much fear that this Court by imposing these rigid procedural requirements may inadvertently have served to discourage these efforts to find more satisfactory solutions for the problems of juvenile crime, and may thus now hamper enlightened development of the system of juvenile courts. It is appropriate to recall that the Fourteenth Amendment does not compel the law to remain passive in the midst of change; to demand otherwise denies 'every quality of the law but its age.'"

to the problems of the [mentally ill] . . ." *McKeiver* v. *Pennsylvania*, *supra*, 403 U.S. at 547. In our view, the Constitution does not mandate a contrary result.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the American Psychiatric Association, urges this Court to affirm the judgment below.

Respectfully submitted,

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FOR ARGUMENT

No. 77-5992

In the
Supreme Court of the United States
OCTOBER TERM, 1978

FRANK O'NEAL ADDINGTON,
Appellant,
vs.
THE STATE OF TEXAS,
Appellee.

On Appeal from the Supreme Court of Texas.

BRIEF FOR THE STATE OF ILLINOIS AS AMICUS CURIAE

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In The
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October Term, 1978

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Appellant,
vs.
THE STATE OF TEXAS,
Appellee.

On Appeal from the Supreme Court of Texas.

BRIEF FOR THE STATE OF ILLINOIS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State of Illinois has some 12,000,000 citizens. Last year nearly 6,700 residents were the subject of involuntary hospitalization proceedings and another 16,000 sought in-patient care on their own. The Illinois Attorney General represents the Illinois Department of Mental Health and Developmental Disabilities, the major single provider of psychiatric care in the state. The State's Attorney of Cook County was responsible for representing the interests of the People of the State of Illinois in

nearly 4,000 of these mental health cases filed in 1977. Illinois has consistently been in the forefront of protecting mentally disabled persons through comprehensive, thoughtful and progressive legislation and programs. The Illinois Mental Health Code of 1967 was considered one of the most progressive in the nation. That code, supplemented by amendments, was reviewed carefully by a panel of 82 experts appointed by the Governor in 1973. Following the report of that study, published in November of 1976, a program of legislative reform was initiated. On September 5, 1978, Governor James R. Thompson signed into law a comprehensive package of legislation designed to not only afford the best possible protection for all citizens of this state, but to require the most freedom in terms of least restrictive alternative settings, for those adjudicated to be subject to involuntary treatment. These new laws stand as a model for effective, humane, and progressive treatment of the mentally disabled.

It is because of Illinois' intense involvement with and concern for the mentally afflicted that this State, through its Attorney General and through the State's Attorney for the largest county in the jurisdiction, respectfully file this brief of *amicus curiae*.

QUESTION PRESENTED

Whether mental health legislation designed to protect the rights of the mentally disabled and the interests of the citizens of a State and the due process clause of the Fourteenth Amendment should be construed so as to require proof beyond a reasonable doubt in proceedings instituted to involuntarily treat an individual.

SUMMARY OF ARGUMENT

It is the position of the State of Illinois that the due process clause of the United States Constitution, as applied to the States, does not require the application of the standard of proof beyond a reasonable doubt in civil commitment hearings.

Although proof beyond a reasonable doubt is required by due process mandates in criminal cases, the utilization of this burden of proof in civil, mental health proceedings would be burdensome and, perhaps, counterproductive. Involuntary treatment hearings are not punitive in nature. The purpose of enlightened mental health laws is treatment oriented and commitment statutes have been enacted to protect the rights and interests of all citizens. The impact of requiring proof beyond a reasonable doubt might well be that many of those in need of judicial intervention would be deprived of their right to treatment.

Many freedoms and liberties are infringed upon as a result of judicial action without the requirement of proof beyond a reasonable doubt. Violation of conditions of probation cases have passed the Constitutional muster by this Court without the application of the strictest, criminal standard of proof being applied.

The issue of the applicable standard of proof in mental health cases has been confronted by many Federal and State courts. While the results are varied, they may be harmonized by reviewing the local definitions of standards of proof. Proof by clear and convincing evidence—when defined as significantly more rigorous than a mere preponderance of evidence—has withstood the demands of due process in mental health cases. In Illinois, "clear and convincing evidence" is the highest standard of proof

afforded in any civil case. The effect of imposing proof beyond a reasonable doubt might well "criminalize" the civil procedure established for involuntary mental health treatment hearings.

Finally, the State of Illinois submits that the imposition of proof beyond a reasonable doubt is unnecessary to protect the rights of the mentally disabled. The laws of Illinois relating to involuntary psychiatric treatment are and have been progressive and patient oriented. Notwithstanding the present Mental Health Code, Illinois' legislature has recently enacted a new body of laws which provide a panoply of safeguards for the rights of patients. A careful examination of the protections afforded mental health care recipients under this new code reveals that requiring proof beyond a reasonable doubt will add no novel aspect to patient freedoms. In fact, the use of a criminal standard of proof in commitment cases may work to the detriment of those, previously established, patient rights.

ARGUMENTS

I.

THE STANDARD OF "PROOF BEYOND A REASONABLE DOUBT" IS INAPPROPRIATE IN CIVIL COMMITMENT PROCEEDINGS.

It is well recognized that the standard of "proof beyond a reasonable doubt" is appropriate, in both criminal and juvenile proceedings, to adequately insure due process. *In re Winship,* 397 U.S. 358 (1970). In the case before this Court, the Appellant urges that this standard be extended to civil commitment cases. This argument has been recently rejected by the Illinois Supreme Court in *In re Stephenson,* 67 Ill. 2d 544, 367 N.E.2d 1273 (1977).

Mental health commitment cases must be distinguished from criminal and juvenile matters. The most obvious distinction is that of purpose. Clearly, no punitive element is implied or intended in civil, mental health commitments. *Cf. Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963). When necessary, the state must act to exercise either the police power vested in it or the authority under *parens patriae* to protect its citizens. "It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power." *Barsky* v. *Board of Regents,* 347 U.S. 442 at 449 (1953).

Understanding the basic theory by which a state enacts and enforces a mental health code, we should consider the requirements of due process. In *Stephenson, supra,* the Illinois court did not ignore the principle of due pro-

cess but responded by carefully balancing its mandates with the intentions of the commitment laws. "Due process . . . is a flexible concept and depends, at least in part, on the circumstances of the particular matter in issue." *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) as cited in *Stephenson* at 1276. A rigid application of due process to mental health cases would likely result in the denial of treatment, a right established by the Illinois Mental Health Code. Ill. Rev. Stats. 1977, Ch. 91½ §12-1.

The standard of proof in Illinois commitment cases is logically distinct from the standard required in criminal matters. That which is sought to be proved is quite different in the two areas in that a criminal trial is conducted to establish the guilt or innocence of a person with respect to a specific, demonstrative act. Evidence—physical, documentary and testamentary, is presented to provide a logical basis for determining whether an act has been committed or omitted. Proof beyond a reasonable doubt is possible and practical under such circumstances.

However, in a mental health proceeding, the issue presented is whether the person is suffering from a mental disorder and, consequently, expected to be dangerous to ones' self or to others or unable to care for ones' self. Ill. Rev. Stats. 1977 Ch. 91½ §1-11. This issue is more complex and frequently less demonstrative than that presented in a criminal proceeding. Consequently, a much more sensitive and difficult proposition must be proved.

In *Robinson* v. *California* 370 U.S. 660 (1961) this Court rejected the notion that one could be criminally punished for the status of being addicted to narcotics. An essential problem in establishing criminal guilt of a "status offense" is proving such a proposition beyond a reasonable doubt. Mr. Justice Harlan, in a concurring

opinion in *Robinson,* stated that ". . . the trial court's instructions permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics." *Ibid* at 678. While the Court struck the statute it did favorably discuss alternatives including the possibility of "compulsory treatment". *Ibid* at 665.

Mental health cases require that proof of a mental disorder be present before involuntary hospitalization may occur. Clearly, the task of establishing the presence of a mental disease would be more difficult and, in many cases, impossible if proof beyond a reasonable doubt was the applicable burden. The presence of a mental disorder is a concept developed by the psychiatric profession and is a function of societal norms and deviations, environment and the human thought process. In the courtroom mental illness is established by expert opinion, utilizing whatever relevant facts are available. In criminal cases, however, the commission of an act is nearly always founded on facts and not opinions. Notwithstanding this difficulty in proof, society must reckon with the fact that mental afflictions occur and the judicial process is often the only vehicle available to insure prompt and satisfactory treatment as well as protection of all citizens. The imposition of the strictest standard of proof threatens to thwart the purpose and goals of our mental health laws to the detriment of the very sector of society it has been designed to protect.

II.

THE STANDARD OF PROOF NECESSARY IN MENTAL HEALTH COMMITMENTS CAN BE HARMONIZED WITH THE LOCAL DEFINITION OF "CLEAR AND CONVINCING PROOF" SO AS TO MAINTAIN BOTH DUE PROCESS AND REALISTIC COMMITMENT LAWS.

The establishment of the appropriate burden of proof is in most cases left to the judiciary. *Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276 at 284 (1966). The consideration of standards of proof must extend beyond a simplistic approach that would have criminal cases utilizing proof beyond a reasonable doubt on one hand and all civil matters invoking a lesser burden on the other. Many proceedings result in a substantial loss of freedoms, rights and privileges without the requirement of proof beyond a reasonable doubt. Deportation proceedings [*Woodby, supra*], expatriation proceedings [*Nishikawa* v. *Dulles,* 356 U.S. 129 (1958)], attorney disciplinary proceedings [*In re Bossov, cert. denied* 423 U.S. 928 (1975)], conservatorship proceedings [*Loss* v. *Loss,* 185 N.E.2d 228 (Ill. 1962)] and violation of a municipal ordinance [*City of Chicago* v. *Mayer,* 308 N.E.2d 601 (Ill. 1974)], all require a standard less than proof beyond a reasonable doubt. Even a violation of conditions of probation need not be proved by the strict criminal standard. "This is so even though the individual facing probation revocation may lose his liberty just as swiftly as a defendant in a criminal case" *People* v. *Grayson,* 319 N.E.2d 43 at 46 (Ill. 1974) *cert. denied* 421 U.S. 994 (1975). As cited in *In re Stephenson,* 367 N.E.2d 1273 at 1278 (Ill. 1977).* Surely, the loss of freedoms

* For an elaborate and thorough analysis of this area consult *In re Stephenson,* 367 N.E.2d 1273 at 1278-1279 (Ill. 1977).

associated with a violation of probation and return to a correctional facility for a fixed period of incarceration is no less an infringement than an involuntary hospitalization for mental treatment. Moreover, the deprivation of liberty argument should not be considered without reviewing precisely what "clear and convincing proof" actually means.

In Illinois, the standard of "clear and convincing proof" has been well defined to be a strict burden imposed in serious but civil cases. In a recent discussion of this proof in Illinois, the appellate court citing a line of cases stated:

> "Clear and convincing evidence means proof which should leave no reasonable doubt in the mind of the trier of the facts concerning the truth of the matter in issue." *Interest of Jones,* 340 N.E.2d 269 at 273 (Ill. 1975).

A review of the decided cases discloses a general trend that as the local judicial definition of the civil "clear and convincing" standard approaches the criminal reasonable doubt standard, as in Illinois, then courts have adopted the clear and convincing standard for mental health commitments. This adoption of the strict civil standard usually is accompanied by emphasis upon the civil nature of the proceedings.

On the other hand, where local law defining "clear and convincing" has been unclear, confused with, or equated to the preponderance standard, as in Wisconsin, then those courts have avoided such standard, and adopted the criminal standard of proof beyond a reasonable doubt of the facts necessary for commitment.

We embark on this effort for the purpose of clarification and persuasion in an area of the law which has been

labeled "vexing" by more than one court. See *O'Connor* v. *Donaldson,* 422 U.S. 563, 574 (1975); *Greenwood* v. *U.S.,* 350 U.S. 366, 375 (1956).

Pennsylvania, like Illinois, has a strict civil "clear and convincing" formulation. In *Tapler* v. *Frey,* 184 Pa. Super. 239 132 A.2d 890 (1957) the Pennsylvania court stated:

> "However, the phrases. . . "clear and convincing" . . . as used in these types of cases (deed reformation) have a technical meaning which is that the witnesses must be found to be credible, that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." (Insert for clarity.) *Tapler* v. *Frey,* 184 Pa. Super. at 244-245.

In the face of that formulation we suggest that it is not surprising that the Federal courts in Pennsylvania have adopted the clear and convincing standard, and rejected the burden of proof beyond a reasonable doubt. See *Dixon* v. *Attorney General,* 325 F. Supp. 966, 974 (M.D. Pa. 1971); *Bartley* v. *Kremens,* 402 F. Supp. 1039, 1051-1053 (E.D. Pa. 1975).

Similarly, the Supreme Court of New Mexico ruled in *Matter of Valdez,* 88 N.M. 338, 540 P.2d 818 (1975) that clear and convincing evidence was a sufficient standard in commitment cases. The case refers specifically to *In re Sedillo,* 84 N.M. 10, 12, 498 P.2d 1353, 1355 (1972) where the court stated—"For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with the abiding conviction that

the evidence is true." It is submitted that the New Mexico court's formulation of the clear and convincing standard does indeed operate to insure basic fairness to persons sought to be committed.

The Supreme Court of Alabama stated in *Edwards* v. *Sentell,* 282 Ala. 48, 208 So.2d 914, 916 (1968) that:

> "A case of specific performance must be established by clear, definite and unequivocal evidence, and must not leave the contract or any of its terms in doubt, *Borden* v. *Case,* 270 Ala. 293, 118 So.2d 751, 81 A.L.R.2d 982; and merely persuasive evidence is fatal to a claim of specific performance, because complainant's case must be established by evidence that produces a clear conviction in the judicial mind. *Owens* v. *Williams,* 276 Ala. 627, 165 So.2d 709."

Predictably the Alabama Federal District Court adopted the clear and convincing standard in *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala 1974).

Local Iowa law holds that clear and convincing evidence means ". . . that the proof is so established that no reasonable uncertainty or doubt as to the truth thereof confronts the trier of fact." *Miller* v. *Martin,* 246 Iowa 910, 915, 70 N.W.2d 141, 144, (1955); *Greene* v. *Bride & Sons Construction Co.,* 252 Iowa 220, 227, 106 N.W.2d 603, 608 (1960). Thus, the Federal District Court in *Stamus* v. *Leonhardt,* 414 F. Supp. 439, 449 (S.D. Iowa 1976) opted for clear and convincing proof as against proof beyond a reasonable doubt.

On the other hand the Kentucky Supreme Court has defined clear and convincing proof as follows:

> "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince or-

dinarily prudent minded people." *Rowland* v. *Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

The Kentucky Court of Appeals held for proof beyond a reasonable doubt in mental health commitment cases in *Denton* v. *Commonwealth of Kentucky*, 383 S.W.2d 681 (Ky. 1964).

Similarly *In re Pickles Petition*, 170 So.2d 603 (Fla. Dist. Ct. App. 1965) held for the reasonable doubt standard in commitment cases. We suggest the court ruled that way because Florida law is not at all clear on what exactly "clear and convincing" means. *See State* v. *Graham*, 240 So.2d 486, 490-491 *footnote* 17 (1970).

Wisconsin law is extremely muddled and contradictory as to the definition of clear and convincing. Thus the Wisconsin Supreme Court has stated in *Kuehn* v. *Kuehn*, 11 Wis.2d 15, 104 N.W.2d 138, 145 (1960) that:

> "Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

See also: *Madison* v. *Geier*, 27 Wis.2d 687, 692 135 N. W.2d 761, 763 (1964) where the court distinguishes between "clear preponderance of the evidence" as against "fair preponderance of the evidence."

It should come as no surprise then in view of the uncertainty as to the intermediate standard of proof in Wisconsin, that when the Federal Court there was called upon to rule upon the burden of proof to be applied in Mental Health cases, it chose proof beyond a reasonable doubt. See *Lessard* v. *Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972)

It is also interesting to note that *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973) and *Suzuki* v. *Quisenberry*, 411 F. Supp. 1113 (D.Haw. 1976) appear to have no available local "clear and convincing" standard. We suggest that the natural judicial response in such a case is to choose, as between the preponderance standard and the reasonable doubt standard, the stricter criminal standard.

We conclude from the foregoing that those jurisdictions, like Illinois, which have a strict civil standard of clear and convincing proof are in a favorable position both to protect the inalienable right to liberty of their citizens, and to maintain their mental health systems without undesirable criminal overtones. We submit that this Court should hesitate to "criminalize" Illinois mental health commitments by applying rhetorical due process formulations to them.

III.

THE ILLINOIS MENTAL HEALTH CODE IS REPLETE WITH PROTECTIONS TO INSURE MAXIMUM CONSTITUTIONAL SAFEGUARDS FOR THE RIGHTS OF THE MENTALLY DISABLED.

On September 5, 1978, Governor James R. Thompson of Illinois signed into law Senate Bills 250, 252, 253, and

255, which, taken in their entirety, comprise the new "Illinois Mental Health Code." This package of bills will become effective January 1, 1979, and will supercede the previously established Illinois Mental Health Code found in the 1977 Illinois Revised Statutes, Chapter 91½ §1-1 *et seq.* This code was one of the most progressive mental health codes in the country at the time of its enactment in 1967 and, supplemented by amendments, has ensured implementation of a comprehensive package of patient rights legislation. However, the new mental health code is a model piece of legislation designed to assure maximum accountability on the part of all service-providers to the mentally disabled for the State, with guarantees of rights, protections and privileges for those mentally handicapped citizens. The new code is equally applicable to the private as well as the public sector, thereby assuring maximum accountability of all service-providers for the first time. The rights of recipients of mental health and developmental disability services are found in Chapter 2, Article 1, entitled "Rights," the full text of which goes from section 2-100 to section 2-111. Following is the full text of the law enumerating those rights.

CHAPTER II

RIGHTS OF RECIPIENTS OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES SERVICES

ARTICLE I. RIGHTS

Section 2-100. No recipient of services shall be deprived of any rights, benefits, or privileges guaranteed by law, the Constitution of the State of Illinois, or the

Constitution of the United States solely on account of the receipt of such services.

Section 2-101. No recipient of services shall be presumed incompetent, nor shall such person be held incompetent except as determined by a court. Such determination shall be separate from a judicial proceeding held to determine whether a person is subject to involuntary admission or meets the standard for judicial admission.

Section 2-102. (a) A recipient of services shall be provided with adequate and humane care and services in the least restrictive environment, pursuant to an individual services plan, which shall be formulated and periodically reviewed with the participation of the recipient to the extent feasible and, where appropriate, such recipient's nearest of kin or guardian. A qualified professional shall be responsible for overseeing the implementation of such plan.

(b) A recipient of services who is an adherent or a member of any well-recognized religious denomination, the principles and tenets of which teach reliance upon services by spiritual means through prayer alone for healing by a duly accredited practitioner thereof, shall have the right to choose such services. The parent or guardian of a recipient of services who is a minor, or a guardian of a recipient of services who is not a minor, shall have the right to choose services by spiritual means through prayer for the recipient of services.

Section 2-103. Except as provided in this Section, a recipient who resides in a mental health or developmental disabilities facility shall be permitted unimpeded, private, and uncensored communication with persons of his choice by mail, telephone and visitation.

(a) The facility director shall ensure that correspondence can be conveniently received and mailed, that telephones are reasonably accessible, and that space for visits is available. Writing materials, postage and telephone usage funds shall be provided in reasonable amounts to recipients who reside in Department facilities and who are unable to procure such items.

(b) Reasonable times and places for the use of telephones and for visits may be established in writing by the facility director.

(c) Unimpeded, private and uncensored communication by mail, telephone, and visitation may be reasonably restricted by the facility director only in order to protect the recipient or others from harm, harassment or intimidation, provided that notice of such restriction shall be given to all recipients upon admission. However, all letters addressed by a recipient to the Governor, members of the General Assembly, Attorney General, judges, state's attorneys, offices of the Department, or licensed attorneys at law must be forwarded at once to the persons to whom they are addressed without examination by the facility authorities. Letters in reply from the officials and attorneys mentioned above must be delivered to the recipient without examination by the facility authorities.

Section 2-104. Every recipient who resides in a mental health or developmental disabilities facility shall be permitted to receive, possess and use personal property and shall be provided with a reasonable amount of storage space therefor, except in the circumstances and under the conditions provided in this Section.

(a) Possession and use of certain classes of property may be restricted by the facility director when necessary to protect the recipient or others from harm, provided that notice of such restriction shall be given to all recipients upon admission.

(b) The professional responsible for overseeing the implementation of a recipient's services plan may, with the approval of the facility director, restrict the right to property when necessary to protect such recipient or others from harm.

(c) When a recipient is discharged from the mental health or developmental disabilities facility, all of his lawful personal property which is in the custody of the facility shall be returned to him.

Section 2-105. A recipient of services may use his money as he chooses, unless he is a minor or prohibited from doing so under a court guardianship order. A recipient may deposit or cause to be deposited money in his name with a service provider or financial institution with the approval of the provider or financial institution. Money deposited with a service provider shall not be retained by the service provider. Any earnings attributable to a recipient's money shall accrue to him.

Except where a recipient has given informed consent, no service provider nor any of its employees shall be made representative payee for his social security, pension, annuity, trust fund, or any other form of direct payment or assistance.

When a recipient is discharged from a service provider, all of his money, including earnings, shall be returned to him.

Section 2-106. A recipient of services may perform labor to which he consents for a service provider, if the professional responsible for overseeing the implementation of the services plan for such recipient determines

that such labor would be consistent with such plan. A recipient who performs labor which is of any consequential economic benefit to a service provider shall receive wages which are commensurate with the value of the work performed, in accordance with applicable federal and state laws and regulations. A recipient may be required to perform tasks of a personal housekeeping nature without compensation.

Wages earned by a recipient of services shall be considered money which he is entitled to receive pursuant to Section 2-105, and such wages shall be paid by the service provider not less than once a month.

Section 2-107. An adult recipient of services, or, if the recipient is under guardianship, the recipient's guardian, shall be given the opportunity to refuse generally accepted mental health or developmental disability services, including but not limited to medication, unless such services are necessary to prevent the recipient from causing serious harm to himself or others. If such services are refused, they shall not be given. The facility director shall inform a recipient or guardian who refuses such services of alternate services available and the risks of such alternate services, as well as the possible consequences to the recipient of refusal of such services.

Section 2-108. Restraint may be used only as a therapeutic measure to prevent a recipient from causing physical harm to himself or others. In no event shall restraint be utilized to punish or discipline a recipient, nor is restraint to be used as a convenience for the staff.

(a) Except as provided herein, restraint shall be employed only upon the written order of a physician. No restraint shall be ordered unless the physician, after personally observing and examining the recipient, is clinically satisfied that the use of restraint is justified to prevent the recipient from causing physical harm to himself or others. The order shall state the events leading up to the need for restraint and the purposes for which such restraint is employed. The order shall also state the length of time restraint is to be employed and the clinical justification for such length of time. No order for restraint shall be valid for more than 12 hours. If further restraint is required, a new order must be issued by a physician pursuant to the requirements provided herein.

(b) In the event there is an emergency requiring the immediate use of restraint, it may be ordered temporarily by a qualified person only where a physician is not immediately available. In such event, a written order of a physician shall be obtained pursuant to the requirements of this Section as quickly as possible, but in no event later than 8 hours after the initial employment of such emergency restraint; and whoever orders restraint in such emergency situations shall document its necessity and place that documentation in the patient's record.

(c) The person who orders restraint shall inform the facility director in writing of the use of restraint as soon as practicable.

(d) The facility director shall review all restraint orders daily and shall inquire into the reasons for the orders for restraint by any person who routinely orders them.

(e) Restraint may be employed during all or part of one 24 hour period, such period commencing with the initial application of the restraint. However, once restraint has been employed during one 24 hour period, it shall not be used again on the same recipient during the

next 2 following calendar days without the prior written authorization of the facility director.

(f) Restraint shall be employed in a humane and therapeutic manner. Specifically, unless there is an immediate danger that the recipient will physically harm himself or others, restraint shall be loosely applied to permit freedom of movement. Further, the recipient shall be permitted to have regular meals and toilet privileges free from such restraint, except when freedom of action may result in physical harm to the recipient or others.

Section 2-109. Seclusion may be used only as a therapeutic measure to prevent a recipient from causing physical harm to himself or others. In no event shall seclusion be utilized to punish or discipline a recipient, nor is seclusion to be used as a convenience for the staff.

(a) Seclusion shall be employed only upon the written order of a physician. No seclusion shall be ordered unless the physician, after personally observing and examining the recipient, is clinically satisfied that the use of seclusion is justfied to prevent the recipient from causing physical harm to himself or others. The order shall state the events leading up to the need for seclusion and the purposes for which such seclusion is employed. The order shall also state the length of time seclusion is to be employed and the clinical justification for such length of time. No order for seclusion shall be valid for more than 8 hours. If further seclusion is required, a new order must be issued by a physician pursuant to the requirements provided herein.

(b) The physician who orders seclusion shall inform the facility director in writing of the use of seclusion as soon as practicable.

(c) The facility director shall review all seclusion orders daily and shall inquire into the reasons for the orders for seclusion by any physician who routinely orders them.

(d) Seclusion may be employed during all or part of one 8 hour period, such period commencing with the initial application of the seclusion. However, once seclusion has been employed during one 8 hour period, it shall not be used again on the same recipient during the next 2 following calendar days without prior written authorization of the facility director.

(e) The physician who ordered the seclusion shall assign a qualified person to observe the secluded recipient at least every 15 minutes. Such qualified person shall maintain a record of such observations.

(f) Safety precautions shall be followed to prevent injuries to the recipient in the seclusion room. Seclusion rooms shall be adequately lighted, heated, and furnished. If a door is locked, someone with a key shall be in constant attendance nearby.

Section 2-110. No recipient of services shall be subjected to electro-convulsive therapy, or to any unsual, hazardous, or experimental services or psychosurgery, without his written and informed consent.

If the recipient is a minor or is under guardianship, such recipient's parent or guardian is authorized, only with the approval of the court, to provide informed consent for participation of the ward in any such services which the guardian deems to be in the best interest of the ward.

Section 2-111. A medical or dental emergency exists when delay for the purpose of obtaining consent would

endanger the life or adversely and substantially affect the health of a recipient of services. When a medical or dental emergency exists, if a physician or licensed dentist who examines a recipient determines that the recipient is not capable of giving informed consent, essential medical or dental procedures may be performed without consent. No physician nor licensed dentist shall be liable for a non-negligent good faith determination that a medical or dental emergency exists.

In addition to the rights elicited in Article I above, under Article II entitled "Procedures", dissemination, distribution, and implementation of those rights is guaranteed in Sections 2-200 through 2-202 which states as follows:

Section 2-200. Upon commencement of services, every recipient who is 12 years of age or older and the parent or guardian of a minor or person under guardianship shall be informed orally and in writing of the rights guaranteed by this Chapter. A summary of these rights shall also be posted conspicuously in public areas of every facility that provides service.

Section 2-201. Whenever any rights of a recipient of services that are specified in this Chapter are restricted, the professional responsible for overseeing the implementation of the recipient's services plan shall be responsible for promptly giving notice of the restriction or use of restraint or seclusion and the reason therefor to:

(a) the recipient and, if such recipient is a minor or under guardianship, his parent or guardian:

(b) a person designated by the recipient upon commencement of services or at any later time to receive

such notice, or if no such person is designated, the nearest relative of the recipient; and

(c) the Guardianship and Mental Health Advocacy Commission, if the recipient so designates.

The professional shall also be responsible for promptly recording such restriction or use of restraint or seclusion and the reason therefor in the recipient's record.

Section 2-202. The Director of the Department and the facility director of each service provider shall adopt in writing such policies and procedures as are necessary to implement this Chapter. Such policies and procedures may amplify or expand, but shall not restrict or limit, the rights guaranteed to recipients by this Chapter.

In Chap. I entitled "Definitions", Section 1-119 entitled "Person subject to involuntary admission" or "subject to involuntary admission" is defined as:

> 1. A person who is mentally ill and who, because of his illness, is reasonably expected to inflict serious physical harm upon himself or another in the near future; or
>
> 2. A person who is mentally ill and who, because of his illness, is unable to provide for his basic physical needs so as to guard himself from serious harm.

When any person is presented for admission to a mental health facility under this subsection within seven (7) days thereafter, the facility shall provide or arrange for a comprehensive physical and mental examination and social investigation of that person. This examination shall be used to determine whether some program other than hospitalization will meet the needs of such person with preference being given to care or treatment in his own community. The foregoing definition of a person in

need of mental treatment taken in conjunction with Article VIII entitled "Court Hearings", illustrates that the current Illinois Mental Health Code is replete with protections to assure that the rights of an individual are protected by:

—allowing hearings to be held in the mental health facility where the respondent is hospitalized. (Section 3-800)

—entitling the respondent to a jury trial (Section 3-802)

—court appointment of one or more physicians, qualified examiners, clinical psychologists, or other experts, to examine the respondent. (Section 3-803)

—allowing the respondent to secure an independent examination by a physician, qualified examiner, clinical psychologist, or other expert, even if the individual is unable to pay for the same. (Section 3-804)

—assuring rights to counsel in every case of civil commitment whether or not the respondent is able to pay for the same services. (Section 3-805)

—guaranteeing respondent his right to be present at any hearing under this Act. (Section 3-806)

—assuring that a respondent may not be found subject to involuntary admission. (Section 3-807)

—guaranteeing a respondent that a treatment plan shall be provided, including a report on appropriateness and availability of alternative treatment settings, social investigation of respondent, and a treatment plan which shall describe the respondent's problems and needs, the treatment goals, the proposed treatment methods, and a projected time table for their attainment. (Section 3-810)

—the court shall consider alternative mental health facilities, using the least restrictive alternative settings for treatment which is appropriate in all cases (Section 3-811)

—establishes an initial order for hospitalization which shall be for a period not to exceed 60 days. After that, every 180 days further review and treatment plan must be established and resubmitted to the court in order to continue hospitalization. (Section 3-813)

—all final court orders must be in writing and accompanied by a statement on the record of the court findings and facts and conclusions of law which must be presented to the patient. Also an appeal from any final order may be taken in the same manner as in any other civil cases, and the court must notify the patient orally and in writing of his right to appeal and inform him of his right to a free transcript and counsel if, in fact, he is indigent. (Section 3-816)

Senate Bill 252 is the amendment to the current Probate Act. The Act sets up the guidelines for appointing guardians for persons whose legal rights have been impaired or for those people who lack sufficient understanding or capacity to make or communicate responsible decisions concerning the care of their persons or estates. The appointment provisions guarantee that the highest standards of care will be utilized in ascertaining and appointing appropriate persons to act in the capacity of guardian for a mentally ill or mentally disabled individual in the confines of the State of Illinois. The different types of guardians, in addition to the different types of guardianship are clearly enumerated, along with the duties of the prospective guardian. Senate Bill 252, taken in conjunction with Senate Bill 253, which establishes the Office of the Guardian, clearly assures that all individuals lacking legal rights will have an appropriate guardian appointed, whose duties and responsibilities are clearly designated by statute to assure that the rights and well-being of a given patient are thoroughly protected.

In addition to creating the Office of the Guardian, Senate Bill 253 also provides for the establishment of the Mental Health & Developmental Disabilities Legal Advocacy Service and the Human Rights Authority. Inasmuch as this Bill creates a special state agency supervised by a board of nine members appointed by the Governor, it is truly a unique and model method for assuring proper patient care and treatment in both the public and private sectors of this State. The Office of the State Guardian was established to achieve a flexible and rational protective service structure, particularly for the mentally disabled citizenry reaching the age of majority. At present, an adjudication of legal incompetency (to be distinguished from a finding that a person is in need of mental treatment) results in the loss of all civil rights. There is no flexibility in the appointment of a conservator for the most part, and the resultant loss of civil rights authorizes the conservator to assume all authority over his ward. The existing conservator structure was criticized as being designed primarily for the affluent.

In response to this criticism, the model legislation recently signed by Governor Thompson creates a relatively easy and responsive process, wherein the court can fashion its guardianship order commensurate with the needs and abilities of the mentally disabled person. Patients' civil rights are protected to the full extent possible in light of the circumstances under which they were hospitalized. The court order respects the authority of the guardian and the rights of the disabled person. Interested parents and family members continue to have priority in the appointment process. Where there are no available or interested family members to serve as conservator, the newly created Office of the State Guardian

assumes that role and, in addition, counsels families and relatives. Procedural due process is provided by requiring the appointment of a guardian ad litem with expertise in dealing with the mentally disabled, and, under certain circumstances, by additional appointment of legal counsel to represent the mentally disabled person. This model legislation meets a long-standing need; it is responsive to the immediate concerns of families of mentally disabled persons and to the future interests of the patient, to protect him when his parents or family die or are disabled.

The Mental Health & Developmental Disabilities Legal Advocacy Service works to meet the need for appointing counsel in all cases where the mentally disabled are present. The need for counsel is apparent in involuntary hospitalization proceedings—but is equally important in other areas. These areas include effective advocacy on behalf of mentally disabled adults and children who are being denied admission or who may be inappropriately transferred or prematurely discharged from the public sector. They also include enforcement of the rights of the mentally disabled against the public and private agencies mandated to provide services. The Federal government has already mandated in the current developmental disability legislation, that states must provide an advocacy component for developmentally disabled clients which is independent of the service provided. The new legislation for Illinois is not only enlightened and in compliance with the Federal trend, but is also designed to pragmatically insure that mentally disabled persons receive those services which the legislature has mandated to be provided.

In addition, the advocacy service is designed to afford services of a private nature for institutionalized patients. These services include providing legal assistance in real-estate transactions, divorce actions, personal estate matters, or any of a multitude of legal problems which may be involved in the day-to-day life of an individual patient.

The Human Rights Authority legislation is a companion to and acts in tandem with the Legal Advocacy Service. It will consist of interested professionals and consumers who will investigate, through their own initiative or in response to complaints, alleged abuses against mentally disabled recipients of services. Many of these human rights groups already exist informally in some institutions in the public sector and are composed of interested parents, relatives and some professional staff-particularly in developmental disabilities institutions. The new law formally and statutorily creates a Human Rights Authority with the ability to effectively monitor and resolve complaints.

Senate Bill 225 deals with confidentiality of mental health records. The current Illinois statutes accord a privilege of confidentiality to only certain designated therapeutic professionals, namely: physicians, psychiatrists, certified social workers and registered psychologists. This new legislation protects communications of not only those professionals previously concerned, but also extends the veil of privilege to communications with other persons who provide necessary services.

In addition, the new law specifically expands the right of a person who receives mental health or developmental disability services to have access to his own records.

The act requires that before disclosure of a record of a confidential nature, the patient give an informed consent. The elements of a consent form are set forth in the new law, and limited exceptions permit disclosure without informed consent, under extraordinary circumstances. Similarily, exceptions to the privilege of confidentiality in judicial and administrative proceedings are defined and limited, such as: civil competency to manage one's own affairs; fitness to stand criminal trial; legal action brought under the Confidentiality Act itself; and proceedings based on child abuse and neglect. The new code further provides that a court considering the applicability of a privilege or any exceptions thereto is authorized to enter protective orders to exclude irrelevant information and to inspect and examine confidential material in camera.

CONCLUSION

The People of the State of Illinois have a deep and compelling interest in the decision of this Court. This State has consistently strived to maintain the optimum balance between the rights of patients and society in general through its progressive legislation and programs for the mentally disabled. The stringent standard of commitment required by Illinois law, when coupled with the rights of review—both administrative and judicial—and the local definition of "clear and convincing proof" provide for a viable, reasonable, and Constitutional Mental Health Code. A decision by this Court with applications to Illinois and other progressive states might act to prevent those in need of treatment from obtaining needed clinical intervention. For the foregoing reasons,

amicus curiae, the State of Illinois, respectfully urges this Court to limit its holding in this cause and find that the due process clause does not require the application of "proof beyond a reasonable doubt" in all mental commitment cases.

Respectfully submitted,

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